88-1910

Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

OCTOBER TERM, 1988

DANIEL H. OVERMYER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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May 22, 1989

Question Presented

1. Whether, in light of (a) the Bankruptcy Code's expansive definition of "claim" [11 U.S.C. §101(4)] and (b) petitioner's fiduciary duty to advance all colorable claims, the statute criminalizing the filing of a "false" bankruptcy "claim" [18 U.S.C. §152] is applicable where, at the time the claim was filed, full-fledged adversary proceedings in Bankruptcy Court were expected to ensue?

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DANIEL H. OVERMYER,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-titled proceeding on February 10, 1989, which affirmed petitioner's judgment of conviction.

Opinions Below

The opinion of the Court of Appeals for the Sixth Circuit is reported at 867 F.2d 937, and is reprinted in the Appendix hereto, beginning at p. 20a, *post.*

The opinion and order of the United States District Court for the Northern District of Ohio, Eastern Division, granting petitioner's motion for a judgment of acquittal is not reported, and is reprinted in the Appendix hereto, pp. 1a-19a, *post.*

Jurisdiction

Petitioner was indicted and tried in the United States District Court for the Northern District of Ohio on nine counts charging bankruptcy fraud and related offenses. The jury convicted on one count of filing a false claim of proof [18 U.S.C. §152], but the district court granted petitioner's motion for a judgment of acquittal [F.R.Crim.P. 29(c)].

Respondent appealed to the Sixth Circuit, which reversed the judgment of acquittal and reinstated the jury's verdict in an opinion dated February 10, 1989. A petition for rehearing was denied on March 24, 1989. The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked pursuant to 28 U.S.C. §1254(1). This petition is filed within the time permitted by Rule 20.1 of this Court.

Statutes Involved

The statutes involved are 18 U.S.C. §152 and 11 U.S.C. §101(4), which are reprinted in the Appendix, at p. 60a, *post*.

Statement of the Case

Petitioner owned and managed the D. H. Overmyer Telecasting Co. ["Telecasting"], which operated a Toledo radio station. It was the station's practice to lease, rather than own, virtually all of its equipment, and beginning in 1976, to lease exclusively from the Hadar International Leasing Co. ["Hadar"], an entity which was controlled, though not owned, by petitioner. The terms and conditions of the leases were determined by petitioner.

One of the leases involved a new 3.5 million dollar transmitter and antenna for Telecasting; Hadar had obtained this equipment in 1979 with financing from Hundred East Credit Corp. ["HECC"], the financing arm of North American Phillips, and signed a lease contract with Telecasting which obliged Telecasting to pay $50,000

monthly, to commence when the equipment was installed. The equipment was delivered to the station through 1980; by January 1981, some but not all, of the equipment had been or was being installed. HECC billed Hadar for this equipment beginning January 1, 1981.

In 1976, Telecasting filed a Chapter 11 petition in New York, which was dismissed in 1980. Petitioner appealed the dismissal, and when the appeal lost, Telecasting filed another Chapter 11 petition in Cleveland on February 6, 1981. On March 27, 1981, Hadar, too, filed for bankruptcy under Chapter 11.

In August of 1981, Hadar filed a claim for proof in the Telecasting bankruptcy proceedings. The claim consisted of several documents whose face sheet indicated a total claim of $859,481 which was premised upon "leases of personal and real property and equipment installation charges." An attached schedule reflected the lease charges made and received by Hadar from Telecasting from 1979 through 1981. Also attached to the claim were copies of the Hadar-Telecasting leases, a schedule of those leases, and a letter stating some $249,116 of charges to Telecasting for "installation expenses incurred" by Hadar.

Proceedings then unfolded in Bankruptcy Court, where Telecasting's interests were protected by the First National Bank of Boston ["FNBB"]; FNBB had been pledged all of Telecasting's stock as collateral for a loan it had extended to Telecasting in 1976, and fiercely resisted the Hadar claim. At the end of an extensive trial, Hadar's claim was disallowed. *In re D.H. Overmyer Telecasting Co., Inc.*, 23 Bnkr. 823 (Bankr.N.D.Ohio 1982), *aff'd* 53 Bankr. 963 (N.D.Ohio 1984).

In January of 1986, the Government secured an indictment charging six counts of bankruptcy fraud, two counts of conspiracy to commit bankruptcy fraud, and one count of mail fraud. Of the nine counts, the district court dismissed five counts pursuant to petitioner's motion

under F.R.Crim.P. 29. Of the four counts that went to the jury, petitioner was acquitted of three, and was convicted only under Count One, which charged bankruptcy fraud [18 U.S.C. §152] by means of filing a false proof of claim. Petitioner thereafter moved for a judgment of acquittal [F.R.Crim.P. 29(c)] on this count, and though the district court granted the motion (opinion at App. pp.1a-19a), the Government convinced the Court of Appeals to reverse and reinstate the verdict. Accordingly, this petition involves only Count One: filing a false claim.

The count charged that the claim was false in three distinct, albeit related, respects: (1) the amount of $400,000 claimed for lease payments from January 1, 1981 to August 1, 1981 (the date the claim was filed) due on the new HECC transmitter equipment was invalid because the payments were not, in fact, due until installation, which had not yet been completed when the claim was filed; (2) the amount of $249,116 claimed for transmitter installation expenses incurred was inflated, and contained amounts which either had nothing to do with the transmitter, were a double-billing, or, if related to the transmitter, had not actually been "incurred" as of the date the claim was filed; and (3) the overall amount claimed by Hadar was false because Telecasting had been overpaying Hadar for years on many of the leases, and it was Hadar that owed Telecasting.

The Government's evidence was derived largely from the testimony of former employees of petitioner, as well as from expert testimony of an accountant who had been hired by FNBB (petitioner's main antagonist at the Bankruptcy Court proceedings) to analyze the Hadar and Telecasting business records.

The Government's evidence was roughly divided in two categories, background evidence, and evidence bearing directly on the indictment's specifications of three falsehoods. The background evidence tended to show that (1)

Hadar and Telecasting did not deal at arm's length with one another; (2) the leases had terms which were distinctly disadvantageous to Telecasting and correspondingly generous to Hadar; (3) the dollar amounts of the leases were determined by an arbitrary formula that bore little relationship to the true value or costs of the leases; and (4) most of the money Hadar derived from Telecasting's lease payments were thereafter paid out to other companies controlled by petitioner.

As to the first specification of falsity—the eight $50,000 lease payments for the new HECC transmitter—the evidence showed that by February of 1981, though the antenna and 80% of the transmitter had been installed, work on the necessary plumbing, electrical and ventilation systems had not been completed, and that the transmitter was thus not operational. The Government argued that because the lease itself did not call for payment until installation was completed, Hadar's claim to payment for the transmitter lease was premature, not owing, and therefore false.

The second falsification was alleged to stem from Hadar's claim of $249,000 for installation expenses "incurred." The evidence showed that, in fact, much of this allegedly false amount was incurred for work on the transmitter installation, and that much of the rest was based on bids, which the claim itself had segregated in a separate grouping of "installation in progress." There was also some evidence, though, that there was one charge of $44,000 for electrical work that had been performed on a different transmitter a few years earlier, and which had already been paid.

The third falsification was alleged to stem from what the Government characterized as Hadar's long-standing pattern of overcharging and overbilling Telecasting on its other leases over the years.

In granting the defendant's post-verdict Rule 29(c) motion, the district court assayed the undisputed evidence (no credibility factors entered the ruling) as to each component of the assertedly "false" claim and found in essence that, when cast against the backdrop of the policies of the Bankruptcy Code, and particularly the fiduciary obligation of Hadar as a debtor-in-possession to avail itself of the broad notion of "claim" in favor of its own creditors, the claim filed by the petitioner was substantially legitimate and based on substantially real and owing obligations. The district court determined that the claim, though not entirely accurate and though based on lease obligations whose *bona fides* and enforceability were disputable by Telecasting, were not criminally false as a matter of law (App. pp. 10a-11a).

As to the HECC transmitter lease payments beginning in January of 1981, the district court ruled that though Telecasting was not obliged to pay until installation was completed, the station in fact had possession of the equipment; and since Hadar itself had been invoiced by HECC beginning in January of 1981, the fact that Hadar prematurely billed Telecasting did not render its claim based on those billings criminally false (App. pp. 11a-12a).

The $44,000 charge attributed to Hood Electrical was not criminally false because, though apparently a double-billing, its inclusion on the claim could just as easily have been a clerical error as an attempt to defraud (App. p. 16a).

The third specification of falsity—that as of February 6, 1981, Telecasting had overpaid Hadar on its lease obligations—was found lacking in evidence of criminal falsity by the district court for two reasons: almost all of those leases had been entered into several years prior to Telecasting's bankruptcy; and the calculations of the asserted overpayment did not take into consideration the HECC transmitter leases (App. pp. 17a-18a).

On the Government's appeal, the court of appeals painstakingly parsed the record (App. pp. 24a-49a) and, seizing upon instances where Hadar's corporate structure, personnel policies and bookkeeping practices seemed unorthodox and self-serving, concluded that when viewed in a light most favorable to the Government, Hadar's bankruptcy claims were "criminally false" in the manner charged by the indictment (App. pp. 52-58a). Unlike the district court, however, the court of appeals did not advert in any way to the 1978 Bankruptcy's Act's definition of "claim," and did not factor the Act's policies into its assessment of whether the claim was criminally false.

REASONS FOR GRANTING THE WRIT

I.

By concluding that a substantially accurate, though disputable, bankruptcy claim was criminally false, the court of appeals ignored the expansive definition of "claim" in the new Bankruptcy Code, and has placed a chilling effect on the filing of such claims.

Among the significant departures from prior bankruptcy law embodied in the 1978 Bankruptcy Code [Pub.L. No. 95-598, codified at 11 U.S.C. §§1 to 1103], is the definition of "claim." The old act—the Bankruptcy Act of 1898, as amended—required a threshold determination of "provability" before any claim could be allowed, setting forth a definitive list of debts which were "provable" against the estate [former 11 U.S.C. §§101 and 103]. Congress added new kinds of provable claims in 1934 and 1938, and courts tended to hold marginally "provable" claims eligible [*see, Maynard v. Elliot,* 283 U.S. 273 (1931)]; nonetheless, the notion of "provability" operated to exclude significant obligations of the debtor from consideration in bankruptcy proceedings.

This, in turn, brought two untoward results. The first was the unequal treatment of claimholders; those who could assert their claims after bankruptcy were apt to recover much more from the debtor than if they had shared on a *pro rata* basis with the other creditors; and where the debtor was a corporation, the holder of a claim deemed not "provable" might never find more than a hollow corporate shell after the debtor's bankruptcy. And, second, the rigid "provability" feature frustrated the fresh-start goals of bankruptcy, as many significant and substantial claims survived discharge.

To avoid these unwelcome effects, the 1978 Bankruptcy Code abandoned the concept of "provability" by defining "claim" itself [11 U.S.C. 101(4)] in lavishly expansive terms:

> Claim means (A) right to payment, whether or not such claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.

The legislative history explicitly noted that the definition represented a "significant departure" from prior law, and that "this broadest possible definition . . . contemplates that all legal obligations of the debtor, no matter how remote or contingent" would be appropriate fodder in a bankruptcy case [Senate Jud. Comm. Report #95-989, 1978 U.S. Code Cong. & Ad. News 5787, 5807-08]. *See generally*, Matthews, *The Scope of Claims Under the Bankruptcy Code*, 57 Am.Bank.L.J. 221 (1983).

Accordingly, in *Ohio v. Kovacs*, 469 U.S. 274 (1985), this Court used uncommonly extravagant language ["broad"] to characterize the Code's notion of claim. Other courts [*e.g.*, *In re M. Frenville Co.*, 744 F.2d 332, 336 (3d Cir. 1984) ("very broad"); *In re Kennise Diversified Corp.*, 34 B.R. 237, 244 n.6 (S.D. Iowa 1981) ("extremely broad"); *In re Baldwin-United Corp.*, 48 B.R. 901, 903 (S.D. Ohio

1985) ("all-encompassing")], as well as bankruptcy scholars have followed suit, with one noting that the Code's concept of "claim" is elastic enough to countenance inclusion of *estimates* in claims (Weintraub & Resnick, Bankruptcy Law Manual, ¶ 5.05[4]). Or, as the district court below phrased it:

> The flexibility of the general statute favors the inclusion rather than the exclusion of claims, even if uncertain [A. p. 10a-11a].

In this case, the petitioner submitted a bankruptcy claim, which was, even under the court of appeals' view of the evidence, substantially accurate. The claim was, of course, *disputed*, but the terms and scope of the dispute were precisely the fodder that bankruptcy proceedings were erected to resolve: validity and value.

Examination of the evidence as to the first specification of falsity (commencement of the $50,000 HECC lease payments as of 1 January 1981) reveals that the equipment not only existed, but had been acquired by Hadar for the benefit of Telecasting, and had been delivered to Telecasting before lease billings began. Nor was there any question that the lease itself entitled Hadar to commence billings when the equipment was delivered, and to invoice Telecasting for these charges. As in countless bankruptcy settings, one of the affected parties—here Telecasting—might have had grounds to assert a defense to the charges, but that merely renders the claim subject to dispute, which is a very different species from a claim that is "false."

The same can be said for the second specification (the installation charges). Again, the evidence established without contradiction that Telecasting did, in fact, have a contractual obligation to pay all installation costs, that the charges billed to Telecasting were all premised upon invoices and bids to Hadar for work done on Telecasting's behalf, and were properly accruable under standard accounting principles as receivables. Again, to the extent

that a portion of these charges might not have been fully ripe for payment, that did not remove them from the realm of legitimate "claims" [§101(4): "contingent"; "unmatured"], and did not render them "false"; disputable, perhaps, but not "false."

The third and final specification dealt with what the Government described as an "overpayment" on the Hadar-Telecasting leases. However, by his own admission, the Government's accountant, Mr. Klein, failed to take into account *all* germane figures in determining that there had been an "overpayment." More to the point though, even assuming an overpayment had been established, that would create a right for Telecasting to seek an offset, and a corresponding intercompany credit, which Telecasting could then apply against its lease obligations. But this is not a false claim, for the Bankruptcy Code does not oblige a claimant to set forth potential offsets available to a debtor.

Nor may it be forgotten that Hadar itself was a debtor in possession by dint of its *own* bankruptcy filing. As such, and wholly ignored by the court of appeals, Hadar had an independent fiduciary obligation to protect the interests of its own creditors [*e.g.*, HECC, to whom it was obliged for the cost of the transmitter, more than 3 million dollars] by advancing all colorable claims against the Telecasting estate.

In sum, then, the claim was not simply colorable, but was substantially accurate; yet the court of appeals, by tightfistedly applying the word "false" to minor discrepancies between the claim as filed and the claim as proven, emasculated the benign expectations of Congress' expansive notion of "claim," and has placed an unnecessary and unwanted chilling effect upon the filing of bankruptcy claims generally.

II.

The false claim clause of 18 U.S.C. §152 was not intended to apply to claims filed at a point in the proceedings where full adversarial litigation on the claims was anticipated by all.

The Bankruptcy Code itself has no penal provisions; it is left to four separate sections of the federal criminal code to guard the integrity of bankruptcy proceedings. 18 U.S.C. §§153 and 154 punish corrupt trustees of custodians of property and §155 punishes corrupt fee arrangements that might deplete the estate. Section 152 penalizes various kinds of deceptions, and consists of nine unnumbered clauses: one clause deals with bribery; two deal with false oaths or declarations; two deal with destruction or concealment of documents; three clauses are directed against concealment, diversion or transfers of assets; and one clause—whose scope is at issue here—punishes the presentation of a false claim against the estate. The "false claim" clause has very seldom been the basis of criminal prosecution; almost all §152 criminal cases involve concealment, diversion or transfers of assets.

The "false claim" clause of 18 U.S.C. §152 was enacted to serve a very particular purpose. A bankruptcy claim, under both the current code [11 U.S.C. §502] and the former code [11 U.S.C. §93(a)], has traditionally been deemed to constitute *prima facie* evidence of the validity and amount of a claim, and creates a sort of presumption which must be overcome by an objection and affirmative proof. Thus, if no objection to the claim is filed, the claim goes untested and unexamined, and becomes eligible for a share in the debtor's estate. The false claim clause was designed to ensure that accurate claims were submitted to a tribunal at which, as of the time of filing, no objections to the claim could reasonably be expected, no adversary proceedings could reasonably be expected to ensue, and where the debtor estate was entirely at the mercy of an

unopposed claimant. *See*, Senate Report No. 1477, *reprinted at* 1960 U.S. Code Cong. & Ad. News 2396.

In that regard, §152's false claim clause bears considerable consonance to other "false claim" criminal statutes. The Criminal Code, for example, punishes the entry of imported goods by means of false statements [18 U.S.C. §542]. Because vast quantities of merchandise enter the country, the Customs Service can't possibly examine each and every item; it must therefore rely, in the end, upon voluntary compliance with Customs tariffs and regulations, the slightest discovered discrepancy bringing confiscatory civil penalties, and possible prosecution under §542. Though there are intra-agency mechanisms to contest Customs levies, the regulations are structured in such a way as to *discourage* dispute of Customs assessments and delinquency notices. The statutory and regulatory scheme expects not dispute, but instant and total compliance with every jot and tittle of a highly technical body of regulations. The tiniest departure from slide-rule accuracy on an entry can subject the importer to drastic §542 penalties, which makes sense because virtually all importations are processed through expert brokers, and because Customs is so dependent upon voluntary disclosures.

The Customs mechanisms parallel those of the Internal Revenue Service, which has its own "falsity" statute [26 U.S.C. §7206(1) & (2)] to help promote accuracy in the more than 100 million returns (70% of them seeking refunds) filed, only 2% of them ever audited, and where non-adversarial reliance on voluntary disclosure is the norm.

Much the same is true for the catch-all false statement statute [18 U.S.C. §1001], which is often used to punish inaccuracies in claims for payments and reimbursements submitted to federal agencies and departments. Federal funds are dispersed directly and indirectly through so many programs to both contractors and beneficiaries that the agencies can't possibly conduct full-scale audits on every one, and must therefore rely largely on voluntary accuracy

on the part of those who seek federal monies. Nothing remotely resembling elaborate bankruptcy litigation is available or contemplated to handle disputed claims. Accordingly, as limited only minimally by the "non-triviality" concept embodied in the crime's element of materiality [*see, United States v. Abadi,* 706 F.2d 178 (6th Cir. 1983)], inaccurate statements and claims, even apparently harmless ones, can easily generate prosecutions under the broad reach of §1001 for false statements.

Section 1001 is instructive here for another reason; far-reaching as it is [*see generally, United States v. Rodgers,* 466 U.S. 475, 480-481 (1984)], there are limits to its applicability, the most germane being the "exculpatory no" doctrine: a person may, in response to questioning by law enforcement operatives, not only falsely deny culpability but may even fabricate responses without incurring liability under §1001. The basis for this exception is clear:

> In a post-arrest investigative setting, a competent government investigator will anticipate that the defendant will make exculpatory statements. A defendant who meets this expectation cannot possibly pervert the investigator's police function. We presume that a thorough agent would continue vigorous investigation of all leads until he is personally satisfied that he has obtained the truth.

United States v. Medina de Perez, 799 F.2d 540, 546 (9th Cir. 1986).

The point is not that deceitful criminal suspects are admirable creatures, but that the applicability of even so far-reaching a false statement statute as §1001 is limited by the *context* in which the false statement is offered, and that when further adversarial scrutiny is sure to follow in the natural course of events, a qualified privilege exists to offer self-serving statements, even if later proved to be inaccurate.

In this case, within weeks after Telecasting filed for bankruptcy early in 1981, FNBB, which had been pledged all

of Telecasting's stock as collateral on an earlier loan, which had been seeking to wrest control of Telecasting from petitioner since at least 1976 (App. p. 35a), and which had its own claim against the Telecasting estate, had successfully petitioned the bankruptcy court to be given control over Telecasting's affairs. By August of 1981, when Hadar filed its claim in the Telecasting proceedings, it was perfectly obvious to all that all claims against Telecasting were going to be the subject of intense litigation, and that none of the competing creditors' claims was simply going to be accepted at face value, taken as *prima facie* evidence of validity and amount. When Hadar filed its claim, then, the bankruptcy court was functioning essentially in the dual role of stakeholder of Telecasting assets and as a referee of an intense dispute amongst rival creditors.

Similarly, Hadar was no different from the ordinary plaintiff suing in federal court for recovery on contracts or leases. Many such plaintiffs lose their suits in whole or in part, either because the "contracts" are not enforceable, their existence cannot be proved, or the amount they claim as due and owing turns out to be exaggerated upon evidence adduced at trial. Yet no one would deem the complaint filed by such losing contract plaintiff to be criminally false. All courts, including bankruptcy courts, exist precisely to resolve these kinds of disputed contentions, and are well-equipped to do so. After all, bankruptcy court procedures are fully stocked with all the pre-trial fact-exploration devices of federal district courts, and Part VII of the Bankruptcy Rules tracks the Federal Rules of Civil Procedure.

In short compass, then, the false claim clause of 18 U.S.C. §152 was not intended to apply to a bankruptcy claim filed, as was the claim in this case, at a point in the proceedings where the claimant and all other parties fully contemplated not a blind *prima facie* acceptance of the claim, but the same kind of full-scale courthouse combat and dispute that would accompany any lease contract lawsuit filed in district court.

This limited application of the false claim clause of §152, as noted above, is fully consistent with the limited legislative purpose that led to its enactment, and does not leave a bankruptcy court any more vulnerable than a district court to fraudulent claims or to claimants who would pollute the truth-finding mechanisms of litigation with specious documents or concocted testimony. The other clauses of §152, the perjury and forgery statutes [18 U.S.C. §§1621 & 1623; 495], the concepts of aiding and abetting and conspiracy—all offer the same full panoply of penal deterrence to the deceitful bankruptcy litigant as they do to the deceitful litigant in district court.

CONCLUSION

For the foregoing reasons, this Court is respectfully urged to grant this petition for certiorari.

Respectfully submitted,

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Dated: May 22, 1989

ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

-v-

DANIEL H. OVERMYER

Defendant

CASE NO. CR86-13
JUDGE SAM H. BELL

Order

On November 21, 1986, a trial jury found the defendant, movant Daniel H. Overmyer, guilty of the charge contained in the first count of an indictment returned against him by a Federal Grand Jury. Now before the court is defendant's motion for judgment of acquittal filed pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure. The motion has been the subject of the Government's answer and the focus of oral argument held on March 27, 1987. Discussion of the merits of defendant's request begins with a brief recapitulation of the case history.

On January 28, 1986, Daniel H. Overmyer was charged in a nine count indictment with submitting and conspiring to submit various false claims and schedules in bankruptcy proceedings in the Northern District of Ohio and the Southern District of New York. After numerous pretrial motions were filed and considered, and after copious discovery was undertaken by the defendant, the trial of this action commenced on October 15, 1986 and continued until November 20, 1986.

At the conclusion of the Government's case, the court granted the defendant's motion for judgment of acquittal under Rule 29(a) of the Rules of Criminal Procedure as to counts six, seven, eight and nine. Thereafter, at the conclusion of all of the evidence, the court granted the defendant's motion for judgment of acquittal under Rule 29(a) as to count two. The court considered and denied a similar request from defendant relating to the remaining counts; counts one, three, four and five were submitted to the jury for its verdict.

On November 21, 1986, the jury, after fifteen hours of deliberation, returned a verdict of not guilty on counts three, four and five, and guilty on count one. After this verdict was rendered, the defendant requested and was granted leave to file a motion for judgment of acquittal on the sole remaining count pursuant to Rule 29(c) of the Rules of Criminal Procedure. It is this motion which is presently before the court.

When reviewing a motion for judgment of acquittal the court must consider *all* of the evidence in the record in a manner most favorable to the Government with respect to each element of the offense. *United States v. King,* 803 F.2d 387, 390 (8th Cir. 1986); *United States v. Wheadon,* 794 F.2d 1277, 1281 (7th Cir. 1986); *United States v. Liefer,* 778 F.2d 1236, 1247 (7th Cir. 1985); *United States v. Martinez,* 763 F.2d 1297, 1312 (11th Cir. 1985); *United States v. Mariani,* 725 F.2d 862, 865 (2d Cir. 1984); *United States v. Adamo,* 742 F.2d 927 (6th Cir. 1984); *United States v. O'Boyle,* 680 F.2d 34, 36 (6th Cir. 1982); *United States v. Brandon,* 633 F.2d 773, 780 (9th Cir. 1980). *Also see Jackson v. Virginia,* 443 U.S. 307, 319 n. 12 (1979). The court should grant such a motion only if it finds that a jury, drawing reasonable inferences from the evidence in the record, could not conclude guilt on each and every element of the offense charged. *United States v. Mariani,* 725 F.2d at 865. It is not permissible for this court to substitute its own determination of the credibility of the

witnesses or the weight of the evidence for the findings of the jury. *United States v. Martinez,* 763 F.2d at 1312; *United States v. Rodriguez,* 702 F.2d 38, 41 (2d Cir. 1983).

The charge contained in count one is, as are all others in the indictment, one which finds its origin in 18 U.S.C. §152. The statute, as it relates to the instant charge, reads as follows:

> Whoever, knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under Title 11 personally or by agent, proxy or attorney . . . [s]hall be fined not more than $5,000 or imprisoned not more than 5 years or both.

The statute section quoted above is one of a group of interrelated and unnumbered admonitions contained in §152. Each form an integral part of the general section entitled "Concealment of assets; false oaths and claims; bribery."

It is altogether reasonable to believe that when judicial officers weigh and determine the interests of the parties in bankruptcy litigation, they must do so on the basis of full disclosures of assets and liabilities and an appreciation of legitimate claims. At a given point in the decisional process, a bankruptcy judge must determine, under the law, whether a given asset is a part of the bankruptcy estate and whether a stated claim constitutes a valid encumbrance on that estate. To do so, the court and those who espouse either side of a given claim must have accurate and complete information concerning the nature of the claim including whether or not it is in dispute. Not all claims are valid; not all invalid claims are the subject of criminal action. The wording of the bankruptcy code itself, 18 U.S.C. §101, allows wide latitude in the filing of any claim. Only where one files a claim in the prescribed manner and includes in it information which tends to preempt the determination of the bankruptcy judge is that

person liable to criminal sanctions authorized by §152. *See United States v. Cherek*, 724 F.2d 1248 (7th Cir. 1984).

Thus, the Government in the instant cause accused defendant of presenting to the bankruptcy court false information with the fraudulent intention of having that court accept the claims and order their payment by Telecasting. The claims and the charges predicated upon them must be the subject of a more detailed discussion.

In count one, Mr. Overmyer was charged with knowingly and fraudulently presenting a false proof of claim on behalf of the Hadar Leasing International Company, Inc. (Hadar) in the amount of $859,481.80 in the bankruptcy proceedings of the D. H. Overmyer Telecasting Company, Inc. (Telecasting) in violation of 18 U.S.C. §152. Specifically, the Government charged that the Hadar proof of claim was false in three separate areas. First, the claim included a sum based on monthly lease charges in the amount of $50,000.00 beginning June 1, 1981. The lease in question related to new transmitting equipment which had not ~~been~~ installed by Hadar at the Telecasting facilities in Toledo. Second, the proof of claim included a charge for $249,116.18 for the installation expenses of the new transmitter equipment which had not been totally completed on the date of the Hadar filing in the Telecasting proceedings. Third, the claim included other lease charges which the Government contends to be false because Telecasting had previously overpaid Hadar for any purported leasing obligations and, in fact, owed Hadar no monies in relation thereto.

The jury in this action was instructed, with respect to the elements of the offense which must be proven beyond a reasonable doubt by the Government under 18 U.S.C. §152 as follows:

> First, that the bankruptcy proceeding of D. H. Overmyer Telecasting had been commenced;

Second, that Mr. Overmyer presented, or willfully caused to be presented, a proof of claim on behalf of Hadar, in the telecasting bankruptcy;

Third, that the proof of claim was false as to a material matter; and

Fourth, that the defendant knew the proof of claim was false, and acted knowingly and fraudulently.

The gist of the offense then is not the validity of the leases or whether they were prudent business-wise. Rather, it is whether a false claim was filed.

As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

As to the first element, there is no dispute concerning the fact that the bankruptcy proceedings of D. H. Overmyer Telecasting had been commenced at the time the Hadar proof of claim was filed. Therefore, your consideration of count one should concern the second, third and fourth elements of the offense charged. That is, whether the defendant willfully caused the proof of claim to be filed on behalf of Hadar; whether that proof of claim was false; and whether the defendant knew the claim was false and acted with fraudulent intent.

In addition to the general elements of the offense set forth above, the court gave to the jury more detailed instructions concerning each of the three specifications contained in Hadar's proof of claim which the Government claimed was false. Further, the court admonished that the jury must agree unanimously that at least one of the three

specifications of the claim set forth in the indictment was proven. Additionally, the jury was advised that its members must agree on the specification which all found to be false so as to legitimize their determination of guilt if such was their decision. Because of this element of possible confusion, and because of the quantity of statistical information offered in the way of proof, the jury's consideration of count one was one fraught with difficulty.

In this motion for judgment of acquittal, the defendant claims that under the bankruptcy laws governing the filing of a proof of claim, the evidence in the record was insufficient for the jury to find that the proof of claim was false, as charged by the Government. Further, the defendant asserts that the evidence was insufficient to prove each or any of the three specifications of falsity. Thus, this court must review the evidence presented during trial, in a manner most favorable to the Government, as to each of the three specifications of falsity in the Hadar proof of claim to determine if the jury could have reasonably found that the proof of claim was false as to each specification. The defendant does not dispute that there was sufficient evidence before the jury to find that Mr. Overmyer controlled both Hadar and Telecasting during the relevant time period.

I

The first specification of falsity charged by the Government in the indictment concerned "a charge of $50,000 per month beginning in January, 1981, for new transmitter equipment lease payments on equipment which was not yet installed." The evidence in the record reveals that at the time of the filing of its petition in bankruptcy, Telecasting was in the process of having a new transmitter and related equipment installed at its Toledo, Ohio television station. This transmitter had been manufactured by the North American Phillips Corporation and was to be used by Telecasting to broadcast the station's signal upon

installation. At that time Telecasting was using an older transmitter which, in the opinion of the station management, was inadequate for the company's needs.

The acquisition and financing of the transmitter was obtained during negotiations undertaken during the period from September, 1979 until January, 1980, through a financing subsidiary of North American Phillips known as Hundred East Credit Corporation (Hundred East). Pursuant to the terms of the conditional sales agreement entered into by Hadar and Hundred East, the transmitter equipment, which was valued at approximately 3.5 million dollars, was transferred to Hadar under a financing arrangement with Hundred East. (Government Exhibits 139, 139A and 139B). Thereafter, Hadar leased the transmitter equipment to Telecasting and Hundred East obtained an assignment of the lease rentals to secure payment for the equipment. Under the terms of this sale Hadar would obtain legal title to the equipment while Hundred East would retain a security interest in the transmitter equipment. The terms of the lease between Hadar and Telecasting provided that the rental payments would commence for this transmitter equipment "when installation is completed." (Government Exhibit 101) The agreement of sale contained no similar term which linked payment to installation. All of these transactions were consumated under the direction and control of the defendant.

Throughout 1980 the equipment purchased from North American Phillips was delivered to Telecasting's station in Toledo, Ohio, and by January, 1981, some, but not all, of the equipment had been or was being installed. In January, 1981, Hundred East, having determined that the equipment had been accepted by Hadar, began billing Hadar for the equipment effective January 1, 1981.

On February 6, 1981, at the direction of Mr. Overmyer, Telecasting filed a petition in bankruptcy for protection from its creditors under Chapter 11 of the Bankruptcy

Code. At the time of this filing the new transmitter equipment was not yet completely installed nor was it operational in any manner. On March 25, 1981, the bankruptcy court ordered that control of the stock of Telecasting be transferred to the First National Bank of Boston. After this date, Mr. Overmyer no longer had any control over the operations at Telecasting and the company was controlled by the bank.

In its proof of claim filed on August 7, 1981, in the Telecasting proceedings, Hadar asserted a right to rentals due under the leases for the Hundred East equipment which totaled $400,000. This represented the $50,000 per month rental payment set by Mr. Overmyer for January, 1981 until the August filing of the claim.

The Government contends that sufficient evidence exists in the record for the jury to find that the $50,000 per month charge effective January, 1981 was false. In support of this position the Government states that "[s]ince there is a substantial amount of evidence to indicate that the installation of the transmitter equipment . . . had not been [completed] as of February 3, 1981, or indeed until 1982, then the fifty-thousand dollar per month charges regarding such leases were on this basis, proven false." Government's Response to Defendant's Motion for Judgment of Acquittal at 7. The Government also asserts that evidence was introduced which demonstrated that Telecasting was deriving no benefit from the Hundred East equipment until it was operational and was using the old transmitter. Based on the testimony that Telecasting could only use one transmitter at a time, the Government argues that charging for the new equipment which was not yet operational was "completely unjustified." Government's Response at 8.

In this regard, the record evidence clearly shows that the equipment at issue was not completely installed and operational in 1981. Instead, the equipment was installed

in 1982 under the direction of the First National Bank of Boston. Thus, Telecasting was using the old transmitter equipment and not the Hundred East equipment. Under such circumstances as those outlined above, the question presented is whether a creditors proof of claim is false when: (a) the creditor claims monies are or will be owing, (b) even though, in fact, a contractual condition precedent to payment exists, and (c) the condition has not arisen or taken place. This is the broad issue raised in the first specification; the issue is not whether such a claim is enforceable in the bankruptcy court or whether the payments claimed were "justified" by common standards of prudent business judgments. The jury was instructed that such questions were not relevant to its final determination.

Consistent with the filing requirements for a creditor of a Chapter 11 debtor in bankruptcy, the jury was instructed as follows concerning a proof of claim.

> A proof of claim filed in a bankruptcy proceeding is a legal document submitted to the court by a creditor of the person or corporation who filed bankruptcy. In this document the creditor is required to notify the court, the debtor and all of the other creditors that he is asserting some claim or right to payment from the estate of the debtor in bankruptcy. This claim or right to payment can be asserted by the creditor whether or not this right or claim is reduced to judgment, is liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. In other words, a creditor can submit a claim whether or not he yet knew the exact amount, whether it is yet ripe, or even if the claim is in dispute, as long as he submits it in good faith. In addition, this proof of claim must be filed with the bankruptcy court within a specified time period after the

> creditor receives notice of the debtor's bankruptcy or the claim may be barred by the bankruptcy court.
>
> A proof of claim is false if it was untrue when made, and was known to be untrue by the person making it, or wilfully causing it to be made. A proof of claim is not false merely because it may be inaccurate or erroneous in any or all respects. The claim may be asserted by a creditor in good faith even though the monies being sought are thereafter successfully disputed by the debtor or disallowed by the bankruptcy court. Instead, a proof of claim is false if the statements contained therein are intentionally inaccurate and submitted without any good faith basis for the claim and are not the result of some mistake, clerical error or inadvertent omission.

See 11 U.S.C. §§101(4), 501.

The purpose of Congress in enacting the broadest possible definition of a "claim" is to provide the bankruptcy court with the jurisdiction to deal with both the breadth and depth of the legal obligations incurred by the debtor. To achieve this purpose it has been the function of the bankruptcy courts to review all claims regardless of how remote, disputed or contingent the purported right to payment may be. *Matter of Pearson,* 773 F.2d 751, 754 (6th Cir. 1985); *In re Kovacs,* 717 F.2d 984, 987 (6th Cir. 1983); *In re Vaughn,* 36 Bankr. 935, 939 (D.C.N.D. Ala.) *aff'd sub nom., Vaughn v. Central Bank of South,* 741 F.2d 1383 (11th Cir. 1984). Thus, the debtor is required to include in its schedules of debts any possible party who may have a claim against the bankruptcy estate and all parties who have notice of the bankruptcy filing must affirmatively act to preserve any possible right they may have to payment from the estate. 11 U.S.C. §523. The flexibility of the general statute favors the inclusion rather than exclusion

of claims even if uncertain. The bankruptcy court is thus given the fullest view of the debtor's position and, as the cause of action progresses, the court can sort the valid from the invalid claims. This statutory approach lends greater reason for strict interpretation of the criminal sanctions provided in §152 on the public policy basis that inclusion of claims is encouraged and should not be chilled by the threat of criminal exposure. The focus of §152 is the knowing and fraudulent submission of false claims, it cannot be read to infringe upon the statutory flexibility of the bankruptcy procedures.

In this action, all of the evidence before the jury could not be reasonably construed to find that the Hadar proof of claim as it relates to the $50,000 per month charge for the Hundred East equipment, was a false claim under the instructions of the law given by this court. All of the evidence before this court demonstrates that Telecasting had *actual possession* of the transmitter equipment pursuant to a lease agreement with Hadar and that Hundred East began invoicing Hadar in January. The fact that the lease agreement contained a provision stating rental payment would not commence until installation had been completed does not operate as some type of legal bar to the filing of a proof of claim as was done in this instance. Nor does the lease term preclude the lessee from making payments to the lessor of more monies than the lease itself required or before the payments are due. The fact that the contracting parties are controlled by a single entity does not in and of itself attach any stigma of fraud or criminality to such transactions. The bankruptcy code expressly provides that "contingent" and "unmatured" claims may be presented pursuant to 11 U.S.C. §101(4)(A), and Congress has provided the bankruptcy court with the authority to review such a claim under 11 U.S.C. §502 prior to approving any distribution from the estate if any party, including the debtor or any creditor, objects to the claim.

It is not the function of this court to subvert without cause the finding of the jury but instead to consider properly all of the evidence in the record to determine if the jury was warranted in finding that each element of the crime charged in the indictment was satisfied. With respect to the $50,000 per month rental charge, the evidence in the record does not support any finding that the portion of the proof of claim concerning the rental of the Hundred East equipment was false under the bankruptcy code. Thus, a reasonable jury considering the instructions of the court could only find that this aspect of the proof of claim was not false as required by 18 U.S.C. §152.

The arguments advanced by the Government are all valid reasons for the bankruptcy court to *disallow* the claim made by Hadar as provided under 11 U.S.C. §502(b). In fact, in this action the bankruptcy court did disallow the Hadar claim after extensive litigation between Hadar, the debtor and the First National Bank of Boston. *See In Re D. H. Overmyer Telecasting Co., Inc.*, 23 Bankr. 823 (Bankr. N.D. Ohio 1982), *aff'd* 53 Bankr. 963 (D.C.N.D. Ohio 1984).

II

The second specification of falsity in the proof of claim, according to the indictment, is "a charge for $249,116.18 for installation charges for new equipment which had not been installed as of February 6, 1981." The evidence in the record regarding this specification reveals that under the terms of the leases between Hadar and Telecasting, the lessee was contractually required to reimburse the lessor for the installation of the Hundred East equipment (Government Exhibits 100, 101 and 105). All of the witnesses who testified readily admitted that throughout this period it was acknowledged that Hadar would undertake the arrangements of having the transmitter equipment installed at the Toledo station and Telecasting would thereafter reimburse Hadar for the costs of installation.

As part of the proof of claim Hadar attached a letter dated February 3, 1981, which some time after that date was sent to Telecasting. This letter listed the various parts of the installation charges being sought. This listing was subdivided into two categories designating the installation completed and the installation in progress. Under the installation completed heading Hadar listed nine items which represented work performed by outside vendors on behalf of Telecasting. The undispute evidence at trial showed that eight of the items listed under this heading actually represented work performed by the vendors on the transmitter equipment or represented delivery and freight charges for this equipment. The ninth item was a charge of $44,000 from Hood Electrical which represented generators rented and used at Telecasting in 1979 but not utilized on the transmitter equipment. Although Hadar had been billed by the various vendors for this work, Hadar had failed to pay many, if not all, of these invoices. In fact, some of these vendors had filed suits against Hadar and Telecasting in the state court system.

The second category of the proof of claim involved the installation in progress claimed by Hadar. This figure represented various estimates for work which had not yet been performed at the station, but on which Hadar had obtained quotes or bids from outside vendors or contractors.

The Government asserts that the evidence before the jury was sufficient to find that the representation of installation in progress on the proof of claim was false. Specifically, the Government states as follows:

> The fact that there was a submission of bids which formed the basis for the figures in the February 3, 1981 letter does not make the claimed charges accurate. The jury had substantial basis for concluding that the letter was misleading as making it appear that Hadar had indeed incurred

> the liability through contract for those charges. The evidence showed that was not the case.

Government's Response to Defendant's Motion for Judgment of Acquittal at 9.

As previously stated, the jury in this action was instructed on the broad legal definition for a claim under the bankruptcy laws. *See* 11 U.S. §101(4). Thus, the function of this court is to review the evidence to determine if the jury could reasonably find after being instructed on the proper legal standard, that this aspect of the proof of claim was false as to a material matter.

The delineation of the work as being "installation in progress" alone would not be sufficient evidence for a reasonable jury to conclude that the claim was false for the purposes of 18 U.S.C. §152. The bankruptcy laws do permit the filing of claims that are readily disputed, contingent and unmature. In essence, the evidence before this court could only be construed as demonstrating that the aspect of the Hadar claim concerning the installation work to be performed was a disputed, unmature claim as permitted by 11 U.S.C. §101(4).

The listing on the claim of the eight items of work which were already performed on the installation of the Hundred East equipment, could also not be viewed by a reasonable jury as a false claim. All of the evidence in the record demonstrates that each of these items had been completed by the outside contractors and that Hadar had been actually billed for these services. Thus, under the lease agreements between the parties, Hadar could charge Telecasting for these expenses. It should be noted that in the Government's response to this motion, there is no reference to these eight items, nor is there any specific assertion of any falsity in these charges.

The Government does contend that the inclusion of the Hood Electrical charge for $44,000 in the proof of claim

was false. In this regard, the Government states the following:

> Despite the fact that Hood Electric did perform services at the television station, those charges had nothing whatsoever to do with installation charges related to the Hundred East equipment. What makes the Hood electrical charge even more egregious, is the fact that the Hood electrical work had been performed in 1979 and prior thereto. . . . The evidence showed that Telecasting had already been charged for the lease of generators which were being provided by Hood Electric. Howard Klein testified to that effect and is so reflected in his summary of the leases (Government Exhibit 51). This item (Hood Electric - $44,000) alone is substantial enough to provide a basis for the jury to find that the installation charges claimed of $249,000 was false.

Government's Response to Defendant's Motion for Judgment of Acquittal at 8-9. The central inquiry regarding the inclusion of the Hood Electrical charge in the proof of claim concerns whether sufficient evidence was presented to the jury to demonstrate that the inclusion of this amount was criminally false.

The single fact that the charge was included in the Hadar claim as an *installation* expense for the Hundred East equipment does not amount to a material falsehood. The undisputed evidence is that Hadar was billed by Hood for the generators and thereafter charged Telecasting. Thus, the mere listing of the invoice under the wrong heading does not constitute sufficient evidence for the jury to find the claim false. However, the evidence before the jury also revealed that Telecasting had previously been billed by Hadar for the lease of Hood generators. Hence, the proof of claim presented a double-billing or charge by Hadar for the generators.

All of the evidence before the jury regarding Mr. Overmyer's participation in the preparation of the proof of claim was that he instructed the employees of Hadar to assemble all of the charges concerning the installation of the Hundred East equipment. In this regard, the Hood Equipment invoice was included among the charges incurred for installation of the equipment. There was no evidence submitted by the Government that this specific item was intentionally included in the proof of claim so as to effectuate a double-billing to Telecasting of this invoice. A reasonable jury could only conclude that the inclusion of the Hood Electrical charge among the installation completed section of the proof of claim was the result of some mistake or clerical error. A reasonable jury based upon the record in this action could not conclude that the Hood Electrical claim was an intentionally inaccurate statement submitted for the purpose of defeating the bankruptcy laws.

III

The third specification of falsity in the proof of claim listed in the indictment is the charge that Telecasting "had overpaid Hadar for any purported leasing obligations which it might have had and actually owed Hadar Leasing International Company, Inc. nothing." The evidence in the record regarding this specification is primarily based upon the testimony of Mr. Klein, the certified public accountant hired by the Government to review Telecasting's and Hadar's records. Mr. Klein testified that by not considering the Hundred East equipment, Telecasting had overpaid Hadar in the past and at the time of the filing of its proof of claim, owed Hadar nothing. Instead, according to Mr. Klein's calculations, Telecasting was owed a substantial amount of money from Hadar.

In support of this specification, the Government claims that evidence was presented in two areas which demonstrate that Telecasting had overpaid Hadar. First, the

Government claims that the amounts paid by Telecasting to Hadar for all of the equipment which was leased was "grossly excessive in relation to the amounts Hadar was paying to vendors for equipment which Telecasting was using." In essence, the Government claims that Telecasting could have obtained the same equipment much less expensively if it would have directly dealt with equipment vendors instead of leasing the equipment from Hadar.

Collaterally, the Government advances the view that equipment which formed the corpus of one of more continuing leases had been, in fact, paid for over time and had no value remaining *as a lease item* at the time the claim was filed. Put in another way, the Government reasons that where evidence is produced showing that successor leases provide the lessor payments in an amount grossly excessive when compared to the actual value of the leased item, the claim of monies due under the terms of that lease are false.

This arguement [*sic*] advanced by the Government is not relevant to whether the proof of claim is false. The business transactions which two corporations controlled by one individual undertake with each other prior to the filing of a Chapter 11 petition are not in violation of 18 U.S.C. §152 simply because the transactions favor one corporation over another. The evidence that the lease payments were excessive for Telecasting compared to the benefits it was receiving under the leases would be valid reason for the bankruptcy court to disallow the lease and any claim for lease payments consistent with 11 U.S.C. §502. However, such evidence does not establish criminal falsity of the proof of claim absent some showing that the leases were entered into for the purpose of deceiving the bankruptcy courts. As previously stated, the statute in question provides sanction for the filing of information which serves or may serve to preempt the determination of the bankruptcy court and its adjuncts from making proper assessment of claims filed. Civil means exist which allow

the bankruptcy court to determine the validity of the claims made; criminal sanctions exist to assure that the information utilized in validating or rejecting the claim is credible information. The question of validity and the question of underlying truthfulness in reporting financial information are separate though interrelated issues. In this action, there is no evidence in the record which would permit a reasonable jury to find that the leases entered into between Hadar and Telecasting were made to deceive the bankruptcy courts. Instead, the record reveals that the leases were entered into for the most part several years prior to the filing of Chapter 11 by Telecasting. In addition, the jury was specifically instructed that "the validity of the leases or whether they were prudent business-wise" was not at issue.

The second argument advanced by the Government concerns the purported erroneous balances on the books and records of Hadar and Telecasting. Because of these adjustments made on the records of the companies several years before the filing of bankruptcy, the balances carried forward were inaccurate. Again, such evidence does not establish criminal falsity in the proof of claim as provided under 18 U.S.C. §152. In this respect, there is no evidence in the record that would permit the jury to reasonably conclude that the adjustments made in the records to reflect some alleged capital contribution or claim by Mr. Overmyer years before the filing of Chapter 11 were intended to defeat the bankruptcy laws.

Accordingly, the court finds that as to count one the evidence in the record does not support the jury's finding of guilt since no jury considering this evidence could reasonably find evidence that a false claim as defined under 18 U.S.C. §152 was submitted by the defendant. Therefore, the court hereby grants the defendant Daniel H. Overmyer's motion for judgment of acquittal pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure.

IT IS SO ORDERED.

/s/ Sam H. Bell

SAM H. BELL
U. S. DISTRICT JUDGE

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 87-3488

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

DANIEL H. OVERMYER,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed February 10, 1989

Before: KRUPANSKY and NELSON, Circuit Judges; and HACKETT, District Judge.*

HACKETT, District Judge. The United States appeals from the judgment of the United States District Court, Northern District of Ohio, granting defendant's motion for acquittal under F.R.Crim.P.29(c). Appellant contends that when the evidence is viewed in the light most favorable to the government, a reasonable jury could have found defendant guilty beyond a reasonable doubt. After a thorough review of the voluminous record in this case, we find that

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*The Honorable Barbara K. Hackett, United States District Judge for the Eastern District of Michigan, sitting by designation.

the jury had sufficient evidence to sustain its verdict. We therefore reverse the judgment of the district court and reinstate the jury's verdict.

PROCEDURAL BACKGROUND

On January 28, 1986, a nine-count indictment was filed against Daniel H. Overmyer and Edmund M. Connery. Overmyer was charged with six counts of bankruptcy fraud, 18 U.S.C. § 152, two counts of conspiracy to commit bankruptcy fraud, 18 U.S.C. § 371, and one count of mail fraud, 18 U.S.C. § 1341. Defendant Connery, charged in six counts of the indictment, was granted a severance.

Prior to submission of the Overmyer case to the jury, the district judge granted defendant Overmyer's motion to dismiss Counts Two, Six, Seven, Eight and Nine pursuant to F.R.Crim.P.29. The jury returned a verdict of guilty on Count One, filing a false bankruptcy claim on behalf of Hadar International Leasing Co. (Hadar) in the bankruptcy of D.H. Overmyer Telecasting Co., Toledo television station WDHO-TV (Telecasting). The jury acquitted defendant Overmyer on Counts Three, Four and Five. Defendant Overmyer then moved for a judgment of acquittal on Count One pursuant to F.R.Crim.P.29(c) which the district court granted.

FACTUAL BACKGROUND

Daniel H. Overmyer opened his first warehouse in 1947, in Toledo, Ohio, and gradually expanded his operations. By 1973 he was operating public warehouses in 32 states.

In addition to his warehouse operations, Overmyer founded Telecasting in Toledo in 1966. In 1969, he obtained a six-million dollar loan from First National Bank of Boston (FNBB) pledging the stock of Telecasting as collateral.

In 1973, the Overmyer warehouse companies entered Chapter 11 in New York. In 1976, Telecasting filed a petition

under Chapter 11 in New York. This proceeding was dismissed in 1980 and appealed by Overmyer. The appeal was denied and, on the same day, Telecasting refiled under Chapter 11 in Cleveland, Ohio. On March 28, 1981, the Cleveland bankruptcy court awarded control of Telecasting to FNBB.

On August 7, 1981, the Overmyer leasing company, operating as Hadar, which also was in Chapter 11, filed a proof of claim for $859,481.80 in the Telecasting bankruptcy proceedings. It is this proof of claim that resulted in Overmyer's indictment.

The proof of claim allegedly was based upon various television broadcast equipment leases between Hadar and Telecasting. A lease agreement for certain equipment was executed in January, 1981, although Overmyer contends that the price and other specific terms were not agreed upon until a later date. Pursuant to this lease agreement, monthly lease payments of $50,000 were not due until the leased equipment was installed. Telecasting was to cover installation costs. The proof of claim filed by Hadar on August 7, 1981, in the amount of $859,481.80 allegedly included lease payments, a $400,000 deposit and $249,116.18 installation costs of the leased equipment.

In its case-in-chief on Count One of the indictment, the government argued that the proof of claim filed by Hadar in the Telecasting bankruptcy was false in three respects and that Overmyer knew it was a false claim:

> First, the sum contained a charge of $50,000 per month beginning in January, 1981, for lease payments on equipment not yet installed.
>
> Two, the sum contained a charge in the amount of $249,116.18 for installation charges for new equipment not installed as of February 6th, 1981.
>
> And third, as of February 6, 1981, Telecasting had overpaid Hadar for any leasing obligations it might have had.

THE TEST FOR REVIEWING A RULE 29(c) MOTION

It is well settled that the test to be applied by a trial court in determining a defendant's motion for acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure is taking the evidence and inferences most favorably to the government, if there is such evidence therefrom to conclude that a reasonable mind might fairly find guilt beyond a reasonable doubt, the issue is for the jury. *Jackson v. Virginia,* 443 U.S. 307 (1979); *Glasser v. United States,* 315 U.S. 60 (1940); *York v. Tate,* Nos. 87-3839/3835 (6th Cir. Sept. 28, 1988); *United States v. Conti,* 339 F.2d 10 (6th Cir. 1964). The Supreme Court has observed that the granting of a motion of acquittal, ". . . will be confined to cases where the prosecution's failure is clear." *Burks v. United States,* 437 U.S. 1, 17 (1978). *See, Blalock v. United States,* 165 F.2d 591 (6th Cir.), *cert. denied,* 329 U.S. 739 (1946).

An appellate court, in reviewing a trial court's decision regarding a Rule 29 motion, applies the same principles to the record it has before it. *United States v. Gibson,* 675 F.2d 825 (6th Cir. 1981). Other circuits have indicated the use of the same test following the trial court's reversal of a guilty verdict pursuant to Rule 29(c). *United States v. Martinez,* 763 F.2d 1297 (11th Cir. 1985); *United States v. Hazeem,* 679 F.2d 770 (9th Cir. 1982); *United States v. Brandon,* 633 F.2d 773 (9th Cir. 1980); *United States v. Beck,* 615 F.2d 441 (7th Cir. 1980); *United States v. Verkonyi,* 611 F.2d 84 (5th Cir. 1980); *United States v. Dreitzler,* 577 F.2d 539 (9th Cir. 1978).

The 11th Circuit in the *Martinez* case, *supra,* stated the test for review of a verdict overturned by a judgment of acquittal as follows:

> On a motion for judgment of acquittal, the court must view the evidence in the light most favorable to the verdict and, under that light, determine whether the evidence is sufficient to support the ver-

> dict. Thus, on this motion, the court assumes the truth of the evidence offered by the prosecution. (Citation omitted).

United States v. Martinez, supra at 1312.

The filing of a false bankruptcy claim is prohibited by 18 U.S.C. § 152 which provides, in pertinent part:

> Whoever knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney, . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both.

THE EVIDENCE BEFORE THE JURY

The jury trial in this matter commenced on October 15, 1986, and continued through November 18, 1986. In support of its allegations, the government introduced the following evidence.

David Raible was associated with Overmyer from 1975 to at least 1983. At various times he also served in the following capacities: on the board and as an officer of Telecasting and an officer and executive vice-president of Hadar; president of Intermodal Systems Leasing, Inc. (ISLI); president of Jeebs Distribution Services (Jeebs) beginning in late 1975 or early 1976; president and an officer of National Distribution Services (NDS) beginning approximately October, 1977; an officer of Jeebs Marketing and Management beginning approximately October, 1977; director and secretary of the corporation of R.T. Systems, Inc. and two of its subsidiaries known as Freight Delivery Service of Florida and TOFC Terminals, Inc.; an officer of Omega Executive Services, Inc.; an officer of AGG Projects, Inc. (AGG); and, an officer of Morton Telecasting. The headquarters for most of these cor-

porations was located at Three Park Avenue in New York. Raible was appointed to all of these positions by Overmyer and received daily supervision by Overmyer. Overmyer was his boss.

Raible testified that Overmyer appointed all of Hadar's officers and that even when Overmyer's son-in-law Stuart Strang, who had been employed pumping gas at a gas station prior to being appointed president of Hadar, was appointed president in 1978 or 1979, Raible continued to report to Overmyer and not to Strang. When asked if Overmyer had any position with Hadar, Raible responded "well not if you will read the corporate structure that was established," although some documents listed Overmyer as a consultant.

Raible testified that it was Overmyer who determined the $16,067.37 monthly figure on lease ML-2, Overmyer who instructed Raible which of Hadar's bills to pay, Overmyer who gave daily instructions regarding the disposition of Hadar's cash and Overmyer who gave instructions to all of the employees at Three Park Avenue. Further, it was Overmyer and not Raible who received the daily reports of Hadar's cash balances and bank accounts.

Regarding the lease of equipment between Telecasting and Hadar, Raible testified that the "Overmyer Formula" was established sometime in 1978, or possibly earlier. Raible stated that the formula developed over a period of time. At one time leases were prepared and later changed as a new formula developed. It was not until late 1977 or early 1978 that a pattern was firmly established and thereafter continued.

Raible assisted Overmyer in developing the formùla. Overmyer would come to Raible and ask Raible to calculate figures based on various percentages to see what the total figure would come to based on calculations at different rates. Overmyer would then make a decision as to which particular calculation would be used.

The "Overmyer Formula" took the total sales price of the equipment being acquired and added to it 20% for each year the lease would be in existence. State sales tax of 4½% was charged on that figure. Twenty-percent of that total amount was required as a deposit, plus a two-percent commitment fee. The balance was divided as monthly payments and the monthly payment had sales tax added to it. Raible testified that it was Overmyer who decided to use this formula. A 20% deposit was not required prior to institution of the "Overmyer Formula," but when the formula was instituted the leases then in existence were recalculated, revised and redone for prior periods at Overmyer's direction.

Raible testified that from 1977 to 1983 he had innumerable discussions with Overmyer regarding the balance owing between Hadar and Telecasting. Raible stated that Overmyer told him "that the leases needed to be increased in their value because additional monies needed to be accounted for that had been transferred from Telecasting to Hadar. And discussions ensued with regard to how to calculate and recalculate or move more equipment or additional equipment into the station to procure and generate more lease revenue for Hadar leasing to account for monies already taken from the station."

Raible explained that he sent government exhibit 147, dated April 6, 1978, to Telecasting per Overmyer's instruction, which exhibit was a letter from Raible to Telecasting changing the leases then in effect from long-term leases to month-to-month leases and raising the monthly rental by $4,200, effective as of February 1, 1977. Raible was then instructed to prepare invoices to reflect the additional monthly charge and to re-do the invoices which previously had been submitted to Telecasting.

Overmyer advised Raible that "a company in bankruptcy such as Telecasting could not expect to get a long-term lease from anyone and Hadar was not going to give them anything more than they would get from anyone else; and it necessi-

tated a short-term month-to-month lease because that was all they could sustain through a Chapter 11 proceeding." Regarding the $4,200 increase, Overmyer told Raible that $4,200 multiplied by whatever months were involved would produce additional revenue for Hadar and that Hadar needed to cover monies that had already been paid by Telecasting to Hadar.

Raible testified that three equipment packages were obtained from One Hundred East Corporation. The first was obtained pursuant to a contract dated September 10, 1979, referred to by the parties as the American Data Systems package (H-1043). With regard to this package, Raible testified that Overmyer did not have any discussions with Walter Corcoran, president of One Hundred East Credit Corporation, the financing affiliate of North American Phillips Corp. (Phillips) since March 1, 1976, although Raible frequently discussed the package with Overmyer and had received instructions from Overmyer regarding these negotiations and that Hadar should be the acquiring company. The second package (H-1044) involved a new antenna and new transmitter. Overmyer did discuss the second package with Corcoran at Corcoran's suggestion that it would be beneficial if he got together with Overmyer to discuss with him the status of his various corporations. As part of these discussions, Corcoran requested and received financial statements of Telecasting. The third package (H-1045) was for the additional equipment needed by Telecasting to improve the quality of the station.

All three equipment packages were reduced to writing in the form of leases between Hadar and Telecasting. Raible testified that it was Overmyer who determined that a 20% deposit would be required on the lease. Leases H-1044 and H-1045 provided for monthly payments of $50,492.88 to Hadar from Telecasting. This amount was determined by charging 160% of the total package divided by 96 months. It was Overmyer who determined this amount. In addition to government exhibit 101 (lease H-1044), bearing monthly

payments of $50,492.88, the government introduced its exhibit 102 (another lease H-1044) which covered the same transmitter and antenna equipment but required monthly payments of no less than $31,557.53. This second lease had been executed at the request of Corcoran who required the lease between Hadar and Telecasting to be in the amount of Hadar's payments to One Hundred East Corporation. This lease was then assigned to One Hundred East Corporation.

Raible explained the procedure for invoicing Telecasting. Raible's secretary would type the invoices monthly and deliver the typed invoices to William Chi, an officer of Telecasting whose office also was at Three Park Avenue.

In late 1980 to early 1981, Raible was given a specific dollar amount needed to cover, and was told to contact William T. Shock, president of Telecasting, to calculate all of the costs necessary to complete equipment installation. *Overmyer told Raible that a substantial proof of claim needed to be filed by Hadar in the Telecasting bankruptcy proceeding in order to support funds that had been removed from Telecasting.* Raible obtained the information from Shock and delivered it to attorney Edmund M. Connery (Connery). Raible testified that a letter was circulated to advise Telecasting of these costs and that he signed this letter at Overmyer's direction.

Raible explained that a $44,000 figure for Hood Electric was the subject of a lease other than H-1043, H-1044 or H-1045 and was in fact billed April 7, 1978. Regarding a letter dated February 3, 1981, attached to the proof of claim, Raible testified that it was not actually sent on that date, but instead at a later time. He testified that he accepted the One Hundred East Corporation equipment on behalf of Hadar pursuant to Overmyer's instructions. Raible stated that he was not aware of a $400,000 deposit being made by Telecasting to Hadar, but recalled discussing this figure with Overmyer sometime prior to filing the claim in the Telecasting bankruptcy. *Overmyer told Raible that the $400,000 figure*

was to represent a deposit for the One Hundred East Corporation items and that it was needed to cover previous cash withdrawals from the television station. Raible was aware that Telecasting had overpaid Hadar with respect to the leases and stated that the $400,000 was not the result of arms-length negotiations on Hadar's behalf with Overmyer.

Raible signed the proof of claim in Connery's office at Three Park Avenue at Overmyer's instructions. Raible did not prepare the schedule attached to the proof of claim, but he may have delivered documents used in preparation of that schedule.

Raible also testified regarding Telecasting's board of directors resolution dated January 5, 1981, calling for monthly rental of $50,000 for the One Hundred East Corporation equipment, effective January 1, 1981. This resolution was signed by Overmyer, Shirley C. Overmyer, Raible and William Chi. Raible testified that this resolution was actually executed subsequent to January 5, 1981. Raible testified that contracts were signed between Hadar and Telecasting regarding H-1044 and H-1045 with several figures, but ultimately the $50,000 figure was used. This figure did not comport with the "Overmyer Formula" which would have required a deposit of $960,000 and monthly payments of approximately $96,000. Overmyer, however, chose the $50,000 figure himself because the formula figures were excessive.

Regarding the installation figures included in the proof of claim, Raible testified that in some instances those were based on incurred charges, but in other cases were based solely on bids.

Howard L. Klein, an accountant, testified that he was assigned to examine the books and records of Telecasting in approximately April of 1981, by his employer Ernst and Whinney at the request of FNBB. He was told by his employer that he would spend approximately twenty to forty hours helping to coordinate efforts of Ernst and Whinney's

auditors of Telecasting's books in Toledo and the lawyers representing Telecasting in Cleveland. Instead, between April, 1981, and the date of Overmyer's trial, Klein spent between 2,500 and 3,000 hours examining Telecasting's books and records. In his review, Klein examined Telecasting's financial statements, general ledgers, cancelled checks, checkbooks, invoices, deposit slips, correspondence files and legal files. Klein stated that a "reasonable" set of records was available for the periods 1977 through 1980, although there were periods of time lacking records, and very few records existed for the period before August, 1976.

When assigned to Telecasting, Klein was given a list of objectives. The first was to establish accounting controls within the station in order to review what kinds of controls were present and to ensure that proper reporting could be performed by the employees. The second objective was to provide monthly financial statements to the bankruptcy court and to review the company's procedures in the preparation of financial statements. Other objectives included preparing a list of assets and liabilities as of February 6, 1981, the date Telecasting filed bankruptcy in Ohio, and to analyze the bankruptcy schedules previously filed by Telecasting and, if necessary, amend them to reflect all inter-company transfers and all leases. In analyzing the leases, Klein also used the books and records of Hadar. Most of the books and records used by Klein were located at Three Park Avenue in New York City.

The leases which Klein examined that were in existence at the time of Telecasting's Clevelend bankruptcy were numbered beginning from H-1001 through H-1050, except for some gaps of approximately eight or nine leases. Some of the leases were identical to leases entered into between Telecasting and ISLI, the former lessor of equipment to Telecasting. When the ISLI leases expired, the assets of ISLI were transferred to D.H. Overmyer Trucking, Inc. (Trucking). Telecasting then entered into new leases for the same equipment with

Trucking. ISLI's books show that its assets were purchased at a cost of $466,000, although this amount was never actually paid. Trucking later assumed the name of Hadar.

Klein also testified that many of the original ISLI leases contained options to purchase for nominal amounts such as $1 at the completion of the lease. However, at the expiration of the leases, rather than exercising the options, Telecasting entered into new, longer term leases at increased rates for the same equipment. For example, Telecasting had thirty equipment leases with ISLI which were consolidated into one lease (H-1002) when entered into with Hadar. Hadar invoiced Telecasting $16,067.37 plus 4½% sales tax a month for these leases, although Trucking had invoiced Telecasting only $12,277. Klein also calculated what the monthly lease payment would be if the original leases had been renewed and the options exercised when due, and came up with a monthly rental of $8,662.85.

Klein testified as to the existence of a formula that was used to compute the terms of the leases between Hadar and Telecasting which he referred to as the "Overmyer Formula." Under that formula, Hadar would take the total cost of the equipment it purchased and determine the number of years that it would lease it to Telecasting. For each year the equipment would be leased, 20% was added to determine the lease obligations. For example, a one-year lease would be 1.2 times the original cost; a two-year lease 1.4 times the original cost; a three-year lease, the most common lease period according to Klein, 1.6 times the original cost, etc. Once the total lease dollar figure was obtained, Hadar would calculate 20% which would be charged as a deposit. The remainder was spread over the life of the lease.

Klein also testified regarding the financial transactions between Telecasting and Hadar. For the period from January, 1976, through March, 1981, Telecasting made payments to Hadar, or on behalf of Hadar to third parties, totaling

$3,011,909. Klein testified that from 1976 through April of 1978, payments made to Hadar matched invoices. However, after April, 1978, the checks issued to Hadar did not match the invoices to Telecasting, but exceeded or preceded the invoices.

Klein testified that for the period January, 1976, through March, 1981, the total cash received by Hadar from all sources was $3,075,000. Of that, $2,804,000 was received from Telecasting, $254,000 came from other companies using Three Park Avenue as their designated home office, and $17,000 came from miscellaneous sources.

Klein also examined Hadar's disbursements. The amount of $2,297,000 was disbursed to Three Park Avenue companies: $497,000 was paid to vendors on leases to Telecasting, $36,000 for property leases or payments made on behalf of Telecasting for which no lease was written, $73,000 to One Hundred East Corporation as payment on leases H-1044 and H-1045 (the transmitter equipment) and $172,000 in miscellaneous disbursements. Klein testified that although Hadar charged sales tax on its leases to Telecasting, no disbursements were made by Hadar for state sales taxes.

Klein further testified as to the existence of other Three Park Avenue companies. AGG is a company that had agreements with both Hadar and Telecasting for personnel and accounting services. Overmyer had the ultimate or final responsibility for the control, direction and the disbursement of funds of AGG. Other Three Park Avenue companies included Peerless, NDS, Jeebs and Weathervane Farms.

Klein was able to identify $743,573.44 worth of checks for the period July 11, 1977, through March, 1981, that were written by Telecasting to Hadar. The same day, or the next day, a check in the exact amount was written by Hadar to AGG. Klein also testified that he found $78,084.75 worth of checks written by Telecasting to Hadar for which Hadar, in turn, wrote identical amounts to Peerless.

Klein prepared a schedule beginning January 1, 1976, of the transactions between Hadar and Telecasting. Klein testified that according to his calculations, as of January 1, 1976, Hadar had overpaid Telecasting by $8,000. However, because he considered this amount insignificant, he began his statement with a zero balance. Klein calculated that as of August 31, 1976, Telecasting had paid Hadar $83,000 in excess of invoices. For the following fiscal year of August 31, 1976, to August 31, 1977, Telecasting overpaid Hadar invoices by $174,000, leaving a cumulative overpayment of $258,000.[1] Through August 31, 1978, Hadar actually invoiced Telecasting $49,000 more than Telecasting's payments, so the overpayment was reduced to $208,000. During the fiscal years ending August 31, 1979, and August 31, 1980, Telecasting overpaid Hadar $165,000 and $101,000, respectively, raising the cumulative overpayment to $473,000 for 1979 and $575,000 for 1980.[2] For the period September 1, 1980, to October 31, 1981, Telecasting invoiced Hadar for $67,000 more than it paid, which decreased the overpayment to $507,793.72.[3] The total payments made to Hadar from January, 1976, through January 31, 1981, were $3,191,909.01. The total disbursements made by Hadar were as follows: $496,683.04 to vendors directly relating to property leased to Telecasting, $36,137.21 to vendors for which no leases were written, $73,048.74 to One Hundred East Corporation on leases H-1044 and H-1045 and $65,800 which Hadar paid to Telecasting.

On cross-examination, Klein testified that although there is nothing wrong with one entity owning several companies, other than the Overmyer related companies, he had never heard of a company that had leasing subsidiaries which only leased to related or affiliated companies.

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[1]As with all others, these figures were reproduced from the record. Our calculation of the excess amounts paid to Hadar for those fiscal years equal a cumulative overpayment of $257,000.

[2]Again, our calculation of the cumulative overpayments for 1979 and 1980 differ from the record. For 1979, we calculated the overpayment at $373,000 and for 1980 at $474,000.

[3]According to our calculations, the $67,000 invoice decreased the overpayment to $407,000.

Regarding the leases with One Hundred East Corporation, Klein testified that the lease for equipment between Hadar and One Hundred East Corporation commenced the first day of the first month after commencement date. Commencement date was defined as the date of written acceptance of collateral or first use, whichever was earliest. One Hundred East Corporation began invoicing Hadar in January, 1981.

Peter Fox, another Telecasting employee, testified that he met with Raible and Overmyer on December 16, 1975, and was instructed by Overmyer to get the good contracts out of ISLI and into Trucking by use of simple assignment promissory notes as the consideration. Fox also met with Overmyer on January 13, 1976, concerning Telecasting's New York bankruptcy. Overmyer told Fox that according to Sidney Levy, a bankruptcy attorney, Telecasting's Chapter 11 must be ready to file on one-hour's notice because there was danger of a receiver being appointed for Telecasting.

On January 19, 1976, Overmyer told Fox to make ISLI's transfers to Trucking retroactive to December 8, 1975.

At a meeting on April 12, 1976, attended by Overmyer, Raible and Fox, Overmyer stated that certain things needed to be done according to Irv Echtman, a bankruptcy attorney who was advising Overmyer: send notice to Arthur Dorfner, president of Telecasting at that time, that the notes regarding the ISLI-Trucking transfer should be dated December 8, 1975; assign ISLI possession as lessee to Trucking as of December 8, 1975; leases should be of short duration; and see that leases in fact are not competitive.

At this same meeting, a concern was raised that in previous testimony concerning where he leased equipment, Dorfner may have said something other than Trucking. Overmyer replied that he had a transcript of the testimony. Overmyer also expressed concern over the high rate of lease payments charged to Telecasting. He stated that they wanted to be very careful because of the FNBB.

Fox testified about another meeting that took place on April 22, 1976, including himself, Raible and Overmyer. Overmyer discussed firing Dorfner. Overmyer was afraid that Dorfner was in league with the banks because Dorfner paid trade bills instead of the attorneys. Dorfner was told to pay according to Overmyer's instructions and not to substitute his judgment. Overmyer spoke with Dorfner about the situation, but did not fire him. According to Fox, Overmyer told Dorfner "I'm willing to put my signature to anything. All I want you to do is to do what I tell you to do and let me control the cash. You could bring the whole ship down." Overmyer also indicated that Telecasting might be placed in Chapter 11 to keep control of it away from FNBB. Telecasting subsequently filed under Chapter 11 on August 10, 1976.

Dorfner testified that WDHO-TV, Telecasting's television station, became operational in May, 1966. At that time, he was executive vice-president of Telecasting. In 1968, he was elected president of Telecasting and became a member of the board of directors. Dorfner stated that the board elected him president, but that the board was obviously directed by Overmyer who was the sole shareholder of Telecasting and chairman of the board. Dorfner testified that in his position at Telecasting, he was the chief administrative officer and general manager of operations, although he worked under Overmyer's supervision. Dorfner testified that Overmyer was always directly interested and was the principle point of report at Telecasting. However, in the years prior to 1976, Overmyer did not get involved in the day-to-day functions of the station.

Dorfner also testified that Overmyer's policy, which was made clear at the outset, was that Telecasting would own no hard assets, but would lease them from an affiliated company. Prior to 1975, Dorfner and the engineers would negotiate lease terms with suppliers. The leasing entity would then lease the equipment from the supplier and lease the equipment to Telecasting at a one-percent mark-up over what the supplier

had charged. There was an understanding that after the lease had been completed, the station would be able to buy the equipment for one dollar or some nominal amount. Dorfner further testified that shortly after he was hired, WDHO-TV became profitable and continued to be profitable.

According to Dorfner, most financial documents were moved from Ohio to New York in 1976. All payables over $25 had to be paid by New York and all payments were directed to New York. At that point, bills began to be paid late and eventually the New York Chapter 11 proceeding was filed to prevent a receiver from being appointed by the FNBB. Overmyer was appointed vice-president of finance and debtor in possession of Telecasting.

Regarding the service contracts, Dorfner stated that they were entered into with Jeebs and AGG. The monthly rate was $1,500, but later was raised by the board of directors to $2,500, over his objection. Thereafter, Dorfner was removed from the board of directors. In June, 1979, the amount was raised to $5,000 per month.

Jeebs and AGG were associated with Overmyer. Dorfner was not aware of any services actually performed by Jeebs or AGG. The contract with AGG for $5,000 per month was presented to Dorfner for his signature in June, 1979, by Raible, William Chi and Connery. At first, Dorfner refused to sign the contract and spoke with Overmyer regarding the agreement. Overmyer told Dorfner that the board had approved it and that Dorfner was to sign the contract before Overmyer left for New York. After discussing the service agreement with Connery, Dorfner signed the agreement.

James Bowe was employed at WDHO-TV as a staff engineer in 1969, and continued in that position until September 15, 1980, when he was made chief engineer. He was later promoted to operations manager and in February of 1981, vice-president of engineering. Bowe first explained the equipment need for the operation of a television station such as

WDHO-TV. The foremost piece of equipment is a transmitter which takes the audio and video signal and transmits it through the air so it can be received by a receiving antenna and then again made into pictures and sound. Microwave equipment is then needed to get the signal from the studio to the transmitter. An antenna radiates the signal. Within the studio, audio and video equipment, such as cameras, tape machines, microphones and film projectors, is needed.

Prior to 1968, through at least 1980, WDHO-TV used a GE 30-kilowatt-hour output transmitter. At that time, WDHO-TV was in the process of obtaining a new transmitter supplied by Phillips. One Hundred East Corporation is the financing entity of Phillips.

In July of 1980, Bowe went to England with the former chief engineer to inspect the transmitter. Bowe testified that it was his job to see that the transmitter was installed and put on the air and explained the procedure for installing a transmitter. When the transmitter is obtained, it is crated. It must be taken out of the crates, assembled, tested as a single unit, torn down and then shipped to WDHO-TV from England. Many electrical changes were required in the building in which the transmitter was to be housed because it required different power than the old transmitter. Duct work had to be installed and plumbing completed for the vapor-cooled system. Further, "inside plumbing," which is the copper coaxial tubes that take the signal out of the transmitter and to the antenna, was needed.

Bowe testified that as of February 3, 1981, the antenna had been installed and 80% of the transmitter itself (the outside shell) had been assembled. Neither the outside plumbing, the electrical work nor the water or vapor cooling systems had been completed.

Bowe testified that the electrical work on the transmitter was completed by Slates Electric Company (Slates) in April, 1983. As of the end of 1980, Slates had not begun any work

on the electrical connection of the transmitter, although some of the layout work had been done, some conduit installed and possibly some switching boxes. Slates stopped work in 1980 and did not resume work until the Fall of 1981.

William Shock was station manager of WDHO-TV in May of 1980, and was responsible for the entire operation of the station. Shock testified that he reported to Overmyer virtually daily. On February 6, 1981, in a five minute conversation with Overmyer, Shock was told that the appeal of the Chapter 11 proceeding in New York had been dismissed, a new petition had been filed in Cleveland and that Shock had been made president.

It was Shock who signed the Statement of Affairs of Telecasting that was filed with the bankruptcy court on March 10, 1981. Both Connery and Overmyer were present when Shock signed it. Shock asked if the information contained in the Statement was accurate and was led to believe that it was, although he could not recall whether it was Overmyer or Connery who instructed him to sign it.

When asked if, at the time he signed the Statement of Affairs, he had any knowledge concerning the truth or accuracy of the $400,000 deposit with Hadar, Shock answered that he did not.

Shock testified that WDHO-TV received the Phillips transmitter in August, 1980, and that Slates began installation in Fall, 1980, but soon pulled off the job because they were not being paid. No additional work was performed in 1980 or 1981. Shock stated that as of February, 1981, the transmitter was "sitting there totally inoperational."

In early 1981, prior to the Cleveland Chapter 11, Overmyer contacted Shock by telephone "to get a handle on the installation costs which could be associated with the transmitter and any other things that he might see upcoming that were even remotely associated with total installation costs." Shock was

instructed to give these figures to Raible. He supplied Raible with the information within days. In May, 1981, Shock received a letter from Raible as president of Hadar dated February 3, 1981, which preceded the February 6, 1981, Chapter 11 in Cleveland that stated:

> Dear Bill,
>
> Installation expenses incurred by this Company on your behalf as of January 31, 1981, for the new antenna, transmitter and satellite communications systems on lease to you, effective as of January 1, 1981, are set forth below.
>
> All such expenses were incurred upon the specific request and approval of your staff.
>
> Please consider this as our invoice to you for such charges.

The total invoice amount was $249,116.18. This letter/invoice was attached to Hadar's proof of claim filed in the Telecasting bankruptcy to substantiate its claim. However, Shock testified that no satellite communication system had been received, and that Shock was not aware of any approval of these expenses having been given.

Shock also testified regarding the specific amount in the February 3, 1981, letter. He testified that the Products Analysis Structural Testing figure included work done on the transmitter, but also included painting a transmitter building and some structural changes to a transmitter building. All of this work had been completed, although it did not all relate to the transmitter installation. Big B Fence was not completed, Milo Bros. was completed, the charge for George Kountopes was for the painting of a studio tower which had been done in the summer of 1980 and was related to the transmitter. The two Auburndale truck charges related to the transmitter, as did the charges for Stainless and Slates, although the Slates work was not completed. Shock testified that the Hood Elec-

trical charges were totally unrelated to the installation of the transmitter, antenna or satellite systems installation, although it was for installation of generators at the transmitter site.

Regarding the twelve items listed February 3, 1981, which accounted for $106,904.14 under "installation in progress," Shock testified that no work had been completed or even started on any of these items, although bids in these amounts may have been received.

The government read into the record the deposition testimony of Overmyer taken on December 2, 1980, in relation to the bankruptcy proceedings. In his deposition, Overmyer stated that he got into the leasing business in the 1950's by leasing trucks and automobiles to warehouse companies which he either owned or controlled. However, sometime in 1975 the leases were transferred to Hadar. At first Overmyer denied the existence of any relationship with Hadar, but admitted that he and his wife leased automobiles from Hadar and that he was at one time president of Trucking. When asked if he could explain how that was relevant to his relationship with Hadar, Overmyer answered "no." Overmyer denied knowing any employees of Hadar or knowing if Raible was employed by Hadar. Overmyer stated that Raible may have been employed by Hadar at some time, possibly as vice-president.

The government also introduced testimony given under oath at the initial meeting of the creditors of Telecasting on March 19, 1981. At that meeting Overmyer was asked to explain the $400,000 with Hadar. Overmyer stated that "it represents eight monthly payments of $50,000 on an aggregate lease which was originally executed in 1979 for equipment financed by [One] Hundred East Credit Corporation which provided for the station a new antenna. The existing antenna was not giving you the right kind of picture . . . . The aggregate net cost was approximately . . . $200,000 and the

finance cost was a little over I think $3,100,000, something like that. It was a deposit on that." When asked if the contract had been performed yet, Overmyer stated "yes, it has. All of the equipment is in place and operational with the exception of the transmitter which should be operational within another month or two."

Overmyer was asked if the $400,000 would still be considered a deposit since the equipment was in place. Overmyer responded that he still considered the money a deposit or pre-paid rent "because it was paid for the purpose of procuring a very favorable lease to the station."

Overmyer further testified that because of FNBB's attempts to have a receiver appointed in 1974 or 1975 "it was impossible to finance equipment through the station" so Telecasting was forced to utilize a leasing entity to equip the station. Overmyer stated that originally this entity was ISLI, but in 1975 Hadar purchased the leases from ISLI. When asked if he owned Hadar, Overmyer stated that it was a company owned and trusted to his children so he would presume it was controlled by him. He was not exactly sure of Hadar's officers, but knew that Raible, Stuart Strang (his son-in-law) and his daughter were officers. He also stated he did not know who sat on Hadar's board of directors.

Overmyer acknowledged that Telecasting had filed no federal tax return since the mid-70's.

Regarding the transmitter equipment, Overmyer testified that he thought Hadar's payments to One Hundred East Corporation were about $40,000 and that Telecasting's payments to Hadar were $50,000. He also stated that he knew that Hadar was required to pay One Hundred East Corporation a deposit, but he did not know how much.

Overmyer testified that if he had a question about how much money was owed he would ask Raible, who was the principal operating officer of Hadar. Raible was in fact also a director of Telecasting.

Overmyer explained that part of his duties at Telecasting was to negotiate favorable leases with Hadar. Overmyer also testified that Telecasting unsuccessfully attempted to obtain financing on its own and that Hadar was the only place from which it was able to lease. Overmyer stated that he negotiated the equipment leases on behalf of Telecasting with Raible on behalf of Hadar. He claimed that the $50,000 a month figure was a compromise obtained as a result of negotiations. Overmyer could not recall if he entered into a resolution to contract with Hadar.

Corcoran testified that his company provided financing on equipment to be used at Telecasting, but made the financial arrangements with Hadar. He stated that he attended a National Association of Broadcasters convention in April, 1979, and was told by one of Phillips' sales representatives that there was a Toledo station interested in purchasing some equipment. In May or June, he talked with Raible to discuss possible financing of that equipment. It was at that time when he first learned that the financing agreement would not be directly with the station, but with Hadar.

A contract was executed by Hadar on September 10, 1974 and by Corcoran and One Hundred East Corporation on January 22, 1980. The contract required one month's rental ($31,557.13) from Hadar. One Hundred East Corporation also required the lease between Hadar and Telecasting to require monthly payments of not less than the amount charged by it to Hadar. One Hundred East Corporation further required that the lease between Hadar and Telecasting be assigned to it as additional security. A copy of this lease signed by Raible, William Chi and Overmyer was provided.

Corcoran testified that he first met Overmyer in the fall of 1979 to discuss the possibility of One Hundred East Corporation providing financing to Hadar and thereafter met with him several times. At these meetings, a number of topics were discussed, including identifying the Overmyer compa-

nies and the fact that the warehouse company and television station were both in bankruptcy. They also discussed the state of the television market in Toledo and the relationship between Telecasting and its creditors such as the FNBB.

Corcoran also testified that as to the lease for the American Data Switcher (H-1043), they did receive seven or eight monthly payments, but that on the second contract, a contract for over a million dollars, no payment was received other than the security deposit. Nor did One Hundred East Corporation receive any payments on the $500,000 equipment for the electronic news gathering van and the work on the tower, although they did receive an unallocated payment for $10,000 or $12,000 in early 1981. Payments were due to commence on these contracts on the first day of the month closest to when they received a signed acceptance certificate from Hadar. With the second and third contracts, this was received in the first week of January, 1981.

E. Thomas Meisner was employed as an accountant by Telecasting in Toledo beginning approximately in February of 1979. He began as the business manager and advanced to vice-president and comptroller. Meisner has a degree from Youngstown State University with a background in accounting. He was not a certified public accountant. As business affairs manager, Meisner's duties included billing, accounts receivables and processing accounts payable. When Meisner began his employment, Telecasting's books and records were located in New York at Three Park Avenue. Meisner's job was to process invoices for payment from New York. He had an accounts payable supervisor under him that processed the billing. Meisner and Dorfner's signatures were required and the bills were then forwarded to New York. If cash was received for invoices in Toledo, it was air expressed to New York the same day. Meisner was given instructions by William Chi who was then comptroller of Telecasting. In August, 1979, Telecasting's books and records were returned to Toledo, at which point the accounting records were brought

up to date and financial statements prepared. However, payment of bills was still done out of New York.

Meisner met with Overmyer and Ron Steiner in approximately mid-to-late 1980 at the Toledo office to discuss getting cash allotted to pay local bills. Overmyer approved a sum to pay local bills.

Part of Meisner's job also included reconciling bank statements with Telecasting's records, but he was unable to do so because many checks were held and many deposits were untrackable.

Meisner would receive monthly a list from New York on amounts paid to Hadar to be posted to the accounting records. Meisner maintained an account reflecting the balance of payments or amounts due and owing between Telecasting and Hadar. The account was numbered 0310.

Meisner terminated his employment with Telecasting on February 27, 1981, but was contacted at his home by Overmyer on Saturday, February 28, 1981, to make certain entries. On February 28, 1981, Meisner posted $626,003.47 to account 0310 as a credit entry to the Hadar account per instructions from Shock. Shock had received instructions by letter from Connery to make these entries. Connery's letter stated, in part: "eliminate other deferred assets by a debit to deposit on new equipment leases of $234,138 and debit to other receivables $31,865, and then T.V. [Telecasting] is obligated to Hadar for equipment installation costs incurred by Hadar." This entry took $626,003.47, which was a debit account to Hadar, transferred it to a credit account, and then to 0408, an equipment lease account. The amount of $391,000 went into another equipment account. Prior to this entry, the books showed that Hadar owed Telecasting $626,003.47.

Meisner later was asked by Connery to make another entry debiting the equipment leases and crediting receivables by

increasing the deposit on One Hundred East Corporation to eight months rent at $50,000 per month, rather than six months at $39,390.52 per month.

Michael Carrieri was an employee of Hadar who reported to Raible. His duties included the preparation of a dated accounts payable listing and a listing of leases to be billed to Telecasting. He also prepared requests for payments and the checks resulting from those requests.

Carrieri testified that he believed that Stuart Strang was president of Hadar while Carrieri was employed there, although the only activity he ever saw Strang perform was the signing of checks. Carrieri thought Raible was an executive vice-president and functioned in all capacities in which Hadar was involved. When asked what activities Hadar was involved in, Carrieri testified that it leased equipment to Telecasting and owed payables to the people who leased the items to Hadar. Carrieri testified that Hadar had no other employees and no payroll.

After Carrieri prepared a listing of payables he would take it to Raible who, in turn, took the list to Overmyer. It would later be returned to Carrieri with instructions.

Peter Lynch, an accountant with Hadar, testified that according to the general ledger he prepared in 1981, which was based on documents given to him by Connery, Hadar had a credit of $376,835.04 on its books owed to Telecasting as of September 1, 1979.

JURY INSTRUCTIONS

The District Court instructed the jury as follows:

* * *

> To warrant your finding the defendant guilty as to Count 1, you must find hat the [government/United States] has proven beyond a reasonable doubt each

of the following essential elements of the crime charged.

First, that the bankruptcy proceedings of D.H. Overmyer Telecasting had been commenced.

Second, that Mr. Overmyer presented or willfully caused to be presented a proof of claim on behalf of Hadar in the Telecasting bankruptcy.

Third, that the proof of claim was false as to a material matter. And fourth, that the defendant knew the proof of claim was false and acted knowingly and fraudulently.

The gist of the offense, then, is not the validity of the leases or whether they were prudent business-wise. Rather, it is whether a false claim was filed.

* * *

As to the first element there is no dispute concerning the fact that the bankruptcy proceedings of D.H. Overmyer Telecasting had been commenced at the time the Hadar proof of claim was filed.

Therefore, your consideration of Count 1 should concern the second and third and fourth elements of the offense charged. That is, whether the defendant willfully caused the proof of claim to be filed on behalf of Hadar or whether the proof of claim was false, whether the defendant knew the claim was false, and acted with fraudulent intent.

To assist you in this determination, let me now instruct you in the bankruptcy law applicable to this count.

A proof of claim filed in a bankruptcy proceedings is a legal document submitted to the Court by a cred-

itor of the person or corporation who filed bankruptcy.

In this document the creditor is required to notify the Court, the debtor, and all other creditors that he's asserting some claim or right to payment from the estate of the debtor in bankruptcy.

This claim or right to payment can be asserted by a creditor whether or not this right or claim is reduced to judgment, is liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

In other words, the creditor can submit a claim whether or not he knows the exact amount, whether it is right, or even if the claim is in dispute, as long as he submits the claim in good faith.

In addition, this proof of claim must be filed with the Bankruptcy Court within a specified time period after the creditor receives notice from the debtor or the claim may be barred by the Bankruptcy Court.

A proof of claim is false if it is untrue when it's made known to be untrue by the person making it or willfully causing it to be made. A proof of claim is not false merely because it may be inaccurate or erroneous in any or all respects. The claim may be asserted by a creditor in good faith even though the moneys being sought are thereafter successfully disputed by the debtor or disallowed by the Bankruptcy Court.

Instead, a proof of claim is false if the statements contained therein are intentionally inaccurate and submitted without any good faith basis for the claim and are not the result of some mistake or clerical error or inadvertent omission.

The Government has alleged that the Hadar proof of claim was false in three particular respects. It's

not necessary that the government prove falsity with regard to each of these three grounds.

The government has the burden of proving falsity if it proves beyond a reasonable doubt that the proof of claim is false on one of the three grounds charged.

However, you may not find the defendant guilty unless you all agree unanimously that the claim is false in one particular respect charged if any at all.

It is not enough that you all believe that the claim is false in some manner. That is, you cannot for example find Mr. Overmyer guilty if some of you think the $400,000 deposit charge on the monthly lease payments on the new transmitter is false and the rest of you think that only the $249,000 charge for installation of the transmitter is false.

There must be at least one specific aspect of the proof of claim that all of you believe beyond a reasonable doubt is false before you may find that the proof of claim was a false claim.

Good faith is an absolute defense to the charges in this count. With respect to the count in the indictment charging the defendant filed a, willfully caused to be filed a, false proof of claim, you are instructed that such a claim even if erroneous, made with a good faith belief in its accuracy, does not amount to a false proof of claim and is not a crime.

Again, the burden of establishing criminal intent rests upon the prosecution. The defendant is under no burden to prove his good faith. Rather, the prosecution must prove knowledge of falsity beyond a reasonable doubt.

With respect to this count, you are instructed that the falsity of the claim is not established merely by

evidence that shows the proof of claim to be inaccurate in any or all respects.

The criminal law does not penalize mere inaccuracies or mistakes. Therefore, the proof of claim to be criminally false, it must be knowingly and intentionally false.

Thus, if you find beyond a reasonable doubt that the proof of claim filed on behalf of Hadar was inaccurate, you must also consider whether or not that claim was intentionally false, made with fraudulent intent, or the result of an honest mistake or omission.

* * *

THE DECISION BELOW

Following fifteen hours of deliberation and based on these instructions, the evidence presented, and its assessment of the credibility of the witnesses, the jury found Overmyer guilty only on Count One, filing a false bankruptcy claim.

On April 22, 1987, the district court granted Overmyer's motion for judgment of acquittal brought pursuant to F.R.Crim.P.29(c). In overturning the jury's verdict, the court reasoned that the government had, at best, established that Overmyer filed a proof of claim subject to dispute.

Regarding the $50,000 per month lease payments beginning in January, 1981, on the transmitter and antenna, the district court found that "Telecasting had actual possession of the transmitter equipment pursuant to a lease agreement with Hadar and that Hundred East began invoicing Hadar in January." The court reasoned:

The fact that the lease agreement contained a provision stating rental payments would not commence until installation had been completed does not operate as some type of legal bar to the filing of a proof

> of claim as was done in this instance. Nor does the lease term preclude the lessee from making payments to the lessor of more monies than the lease itself required or before the payments are due.

Regarding the second specification of falsity in Count One, that the $249,116.18 sum contained in the proof of claim contained charges for installation not incurred as of February 6, 1981, the district court also found that a reasonable jury considering the evidence and instructions of the court, could not find the proof of claim false in this respect, but only that a clerical error had been made. The court held:

> [t]he single fact that the [$44,000 Hood Electric] charge was included in the Hadar claim as an *installation* expense for the Hundred East equipment does not amount to a material falsehood. The undisputed evidence is that Hadar was billed by Hood for the generators and thereafter charged Telecasting. Thus, the mere listing of the invoice under the wrong heading does not constitute sufficient evidence for the jury to find the claim was false. However, the evidence before the jury also revealed that Telecasting had previously been billed by Hadar for the lease of Hood generators. Hence, the proof of claim presented a double-billing or charge by Hadar for the generators.

The district court also found that the government had not met its burden in establishing the third specification of falsity in Count One, namely that as of February 6, 1981, Telecasting had overpaid Hadar for its leasing obligations. The district court reasoned that the evidence showing that the lease amounts were excessive or that the leases on the equipment which were rewritten upon expiration for equipment no longer of value was irrelevant for a finding of fraud. Further, the district court noted that the evidence on this claim was mainly presented by Klein, who did not consider the One

Hundred East Corporation equipment in his calculations. Again, the court ruled that the jury did not have sufficient evidence to find that Overmyer had intended to deceive the bankruptcy court, especially since many of the leases were entered into several years prior to Telecasting's bankruptcy.

DISCUSSION

As stated by the district court in its April 22, 1987, Order at p.20, ". . . criminal sanctions exist to assure that the information utilized in validating or rejecting a claim is credible information." After a thorough review of the evidence before the jury, this court can now only conclude that contrary to the finding of the trial judge, the jury had sufficient evidence before it from which it could reasonably conclude that Overmyer's actions were intended to deceive the bankruptcy court.

In his original motion for judgment of acquittal on Count One pursuant to F.R.Crim.P.29(c), Overmyer did not dispute that there was sufficient information for a jury to conclude that he in fact controlled Hadar and Telecasting. This does not mean that any evidence presented which implies that at one time Overmyer tried to hide this relationship is irrelevant. Instead, it is probative of Overmyer's intent and knowledge at the time the bankruptcy proceedings were pending.

In general, the jury knew that Telecasting filed a bankruptcy petition in New York in 1976 which was dismissed by the bankruptcy court in 1980. That dismissal was appealed. On February 6, 1981, the day that the appeal was denied, Telecasting filed a bankruptcy petition in Cleveland, Ohio. On March 29, 1981, the bankruptcy court awarded control of Telecasting to the FNBB. Hadar filed a petition under Chapter 11 on March 31, 1981, in New York which petition was transferred to Cleveland by the bankruptcy court.

The jury also heard Overmyer's deposition statement taken on December 2, 1980, in which he denied having any rela-

tionship with Hadar, other than leasing automobiles from Hadar, and in which he denied knowing any employees of Hadar. The jury heard Overmyer's statement under oath made at the meeting of creditors in relation to the bankruptcy proceedings at issue in which he testified that the One Hundred East Corporation equipment was installed and would be operational in a month or two, and that the $400,000 "was paid for the purpose of procuring a very favorable lease to the station." While Overmyer admitted that Hadar was owned and trusted to Overmyer's children, he claimed to be unaware of Hadar's board of directors and unsure as to its officers. He also claimed that the $50,000 monthly lease figure on the One Hundred East Corporation equipment was negotiated at arms-length between himself on behalf of Telecasting and Raible on behalf of Hadar.

> **I.** ***There was sufficient evidence produced at trial from which the jury could have found that the bankruptcy claim contained a charge of $50,000 per month beginning January, 1981, for lease payments on equipment not yet installed.***

The lease between Telecasting and Hadar provided that payment was to commence when the equipment was "installed." Although One Hundred East Corporation's payment to Hadar began in January, this is irrelevant. If Hadar and Telecasting had been nonrelated entities, Hadar would not have been able to accelerate the payment due date. Because Overmyer was kept apprised on a daily basis of *all* of the functions of Hadar and Telecasting, the jury could infer that he knew the equipment was not yet installed or operational. This is substantiated by Overmyer's own testimony at the creditor's meeting where he acknowledged that he knew the equipment was not operational or completely installed. Also, Overmyer failed to mention the fact that the contractors had walked off the job in 1980 and ceased all installation work because they had not been paid. That the station under FNBB eventually completed installation in 1983 is irrelevant.

While Bowe testified that as of February 3, 1981, the antenna and 80% of the transmitter had been installed, the outside plumbing, electrical work and the vapor and cooling systems had not been completed. As of March 13, 1981, none of the electrical connection work had been completed. Shock, Telecasting's president, explained that as of February, 1981, the transmitter was "totally inoperational."

Moreover, there were numerous discussions between Raible and Overmyer regarding the fact that leases needed to be increased to cover sums already taken out of Telecasting and transferred to Hadar. From 1977 to 1983, Raible had several discussions with Overmyer regarding the balance owing between Hadar and Telecasting. At Overmyer's insistence, the leases were increased in value to account for additional monies that had been transferred from Telecasting to Hadar. Raible and Overmyer discussed the means by which the leases would be calculated or recalculated and the movement of additional equipment to the television station to procure and generate additional lease revenue for Hadar to account for money previously taken from Telecasting.

Per Overmyer's instructions, Raible sent a letter dated April 6, 1978, to Telecasting which changed the leases then in effect from leases for specific terms to month-to-month leases. The monthly rental rate was raised by $4,200, effective as of February 1, 1977. Raible was then instructed to prepare invoices to reflect the additional monthly charge and to re-do the invoices which had previously been submitted to Telecasting.

Overmyer's explanation of this change to Raible was that "a company in bankruptcy such as Telecasting could not expect to get a long-term lease from anyone and Hadar was not going to give them anything more than they would get from anyone else; and it necessitated a short-term month-to-month lease because that was all they could sustain through a Chapter 11 proceeding." With respect to the $4,200

increase, Overmyer explained that $4,200 multiplied by whatever months were involved would produce additional revenue for Hadar and that Hadar needed to cover monies that had already been paid by Telecasting to Hadar.

The $50,000 lease payment itself is questionable. The $50,000 figure was arrived at in approximately March, 1981, but dated as a resolution of January 5, 1981. At Overmyer's direction, the board members as of January, 1981, signed the resolution so that it would look like the decision to pay $50,000 was arrived at in January. The board in January did not include the same individuals as it did in March, 1981, and nothing suggests the January board members had any authority to act after they were off the board!

The above resolution called for $50,000 monthly equipment rental on the One Hundred East Corporation equipment effective as of January 1, 1981. The resolution was signed by Overmyer, Shirley C. Overmyer, Raible and William Chi.

Contracts were signed between Hadar and Telecasting on H-1044 and H-1045 with several figures, but ultimately the $50,000 figure was used. This figure does not comport with the "Overmyer Formula." The "Overmyer Formula" would have required a deposit of $960,000 and monthly payments of approximately $96,000. Realizing that these figures were excessive, Overmyer chose the $50,000 figure himself which is less than the "Overmyer Formula."

Contrary to Overmyer representations to Telecasting's creditors, this figure was not negotiated at arms-length. Overmyer thought that Hadar's payments to One Hundred East Corporation were around $40,000 and that Telecasting's payments to Hadar were $50,000. Hadar actually only paid One Hundred East Corporation $31,000.

When viewed in the light most favorable to the government, this evidence was sufficient to support the jury's verdict

that the bankruptcy claim contained a charge of $50,000 per month beginning January, 1981, for lease payments on equipment not yet installed.

> II. ***There was sufficient evidence produced at trial from which the jury could find that the bankruptcy claim contained a charge of $249,116.18 for installation charges for new equipment which had not been installed as of February 6, 1981.***

As already indicated, the contractors stopped work in 1980. No additional work was performed until 1982. In 1981, at a time when no installations were being performed, Overmyer told Shock "to get a handle on the installation costs which could be associated with the transmitter and any other things that he might see upcoming which were even remotely associated with total installation costs." Shock compiled these figures and gave them to Raible.

In May, 1981, Shock received a letter/invoice from Raible dated February 3, 1981, which preceded the Chapter 11 in Cleveland, that listed the installation expenses allegedly incurred by Hadar as of January 31, 1981. Raible stated that the expenses had been incurred upon the specific request and approval of Shock's staff. The total invoice amount was $249,116.18. Hadar used this letter/invoice to substantiate its proof of claim.

Although the letter/invoice indicated that the expenses had been incurred as of January 1, 1981, and had been approved by Shock's staff, Shock testified that a satellite communication system had not been received and that he was not aware of any approval of these expenses having been given.

Shock explained the specific amount in the February 3, 1981, letter/invoice. The Products Analysis Structural Testing figure included work done on the transmitter, but also included painting a transmitter building and some structural changes to a transmitter building. While this work had been

completed, it did not all relate to the transmitter installation. Big B Fence was not completed, Milo Bros. was completed, the charge for George Kountopes was for the painting of a studio tower which had been done in the summer of 1980 and was related to the transmitter. The two Auburndale truck charges related to the transmitter, as did the charges for Stainless and Slates, although the Slates work was not completed. Shock testified that the Hood Electrical charges were totally unrelated to the installation of the transmitter, antenna or satellite systems installation, although it was for installation of generators at the transmitter site.

Thus, Shock's testimony made clear that some of the work included in the letter/invoice under "work completed" was not only unrelated to the installation costs associated with the transmitter, but also was incomplete.

Regarding the twelve items which accounted for $106,904.14 under "installation in progress," Shock testified that no work had been completed or even started on any of these items. While bids in these amounts may have been received, there were no contractual obligations for this work.

Raible's testimony substantiated Shock's. In late 1980 to early 1981, Overmyer gave Raible a specific dollar amount needed to cover and was told to contact Shock. Overmyer instructed Raible to accumulate all of the costs that would be necessary to complete the installation. Overmyer told Raible to do so to enable Hadar to file a substantial proof of claim in the Telecasting bankruptcy proceeding in order to support funds which he knew had already been removed from the television station. After Raible obtained the information from Shock, he delivered it to Connery. Raible signed this letter at Overmyer's direction.

Raible explained that some of the installation figures included in the proof of claim were based on incurred charges, but in other cases were based only on bids. Raible stated that the $44,000 Hood electrical charge did not relate

to the installation of the transmitter, in fact was actually billed in April, 1978, and was the subject of a lease other than H-1043, H-1044 or H-1045.

Raible on behalf of Hadar invoiced Shock on behalf of Telecasting, for these amounts in May, 1984. Raible dated the invoice February 3, 1981, so that it preceded the bankruptcy, and acknowledged that it was not sent on that date, but rather at a later time.

When viewed in the light most favorable to the government, we conclude that this evidence was sufficient to support the jury's finding that the bankruptcy claim contained a charge of $249,116.18 for installation charges for new equipment which had not been installed as of February 6, 1981.

III. ***There was sufficient evidence produced at trial from which the jury could find that the bankruptcy claim contained charges that as of February 6, 1981, Telecasting had overpaid Hadar for any leasing obligations which it might have had with Hadar.***

Unrefuted substantial evidence supports a finding that Hadar had in fact overpaid Telecasting. Klein calculated that as of August 7, 1981, the date of the proof of claim, Telecasting had overpaid Hadar. According to Klein's calculations, Telecasting had paid Hadar $83,000 in excess of invoices as of August 31, 1976. The following year, Telecasting overpaid Hadar by $174,000 which increased the overpayment to $258,000.[4] In 1978, the overpayment decreased to $208,000. For the fiscal years of 1979 and 1980, Hadar overpaid Telecasting by $165,000 and $101,000 respectively. This increased the overpayment to $473,000 for 1979 and $575,000 for 1980.[5] In 1981, the overpayment decreased by $67,000, leaving a cumulative overpayment of $507,793.72.[6]

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[4]See footnote 1, *infra.*

[5]See footnote 2, *infra.*

[6]See footnote 3, *infra.*

Klein arrived at these figures by examining the books and records of Telecasting and Hadar, and spent between 2,500 and 3,000 hours doing so.

Klein also testified concerning the monies transferred from Hadar to AGG. Klein identified $743,573.44 worth of checks from July 11, 1977, to March, 1981, which were written by Telecasting to Hadar. The same day, or the next day, a check in the exact amount was written to AGG under the guise of service agreements.

Also, Meisner, Telecasting's accountant, was called to work by Overmyer on February 28, 1981, to make certain entries in Telecasting's books. This occurred one day after Meisner terminated his employment with Telecasting.

Through these entries, Meisner cancelled a $626,003.47 credit which Hadar owed to Telecasting. The credit was posted to lease accounts and deposit so that it appeared as though Hadar owed no money to Telecasting and that the credit was used to pay the $400,000 deposit and lease payments. The transaction cancelled the $626,000 overpayment by crediting $234,160 to deposit, that being six months at $39,390.52, and $391,865 to installation costs. Later when the decision was made to charge $50,000 per month, Meisner was asked by Connery to again change the books to reflect eight months at $50,000 for deposit and only $249,000 for installation.

According to Lynch, Hadar's accountant, Hadar owed Telecasting $376,835.04 as of September 1, 1979. Yet, the proof of claim filed in Telecasting's bankruptcy began with a zero balance as of September 1, 1979.

Finally, Raible was aware that Telecasting had overpaid Hadar with respect to the leases and testified that the $400,000 deposit was not the result of arms-length negotiations on Hadar's behalf with Overmyer.

The jury was made aware of Overmyer's involvement and participation in the daily business affairs of both Hadar and

Telecasting. Thus, the jury could reasonably charge Overmyer with having the same knowledge of Telecasting's overpayment to Hadar. Nothing was done without Overmyer's permission, and the events which transpired to substantiate Hadar's proof of claim were done at Overmyer's insistence.

Viewed in the light most favorable to the government, this evidence was more than sufficient to support the jury's verdict that, as of February 6, 1981, Telecasting had overpaid Hadar for any leasing obligations which it might have had with Hadar and that Overmyer was not only aware of the overpayment, but orchestrated the whole scheme.

CONCLUSION

The jurors are to be commended for "seeing through" defendant's elaborate paper chase fraud and certainly had before them sufficient evidence with which to do so. Credibility of the witnesses was for the jury to decide.

For these reasons, the judgment of the district court is reversed and the verdict of the jury reinstated.

ORDER DENYING MOTION FOR REHEARING DATED MARCH 24, 1989

No. 87-3488

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

DANIEL H. OVERMYER,

Defendant-Appellee.

FILED
MAR 24 1989
LEONARD GREEN, Clerk

Order

BEFORE: KRUPANSKY and NELSON, Circuit Judges; and HACKETT, District Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

LEONARD GREEN, CLERK

STATUTES INVOLVED

18 U.S.C. §152

Concealment of assets; false oaths and claims; bribery

Whoever knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any case under title 11, any property belonging to the estate of a debtor; or

Whoever knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11; or

Whoever knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty or perjury as permitted under section 1746 of title 28, United States Code, in or in relation to any case under title 11; or

Whoever knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney; or

Whoever knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11; or

Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any case under title 11; or

Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against him or any other person or corporation, or with intent to defeat the provisions of title

11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation; or

Whoever, after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a debtor; or

Whoever, after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshall, or other officer of the court entitled to its possession, any recorded information, including books, documents, records, and papers, relating to the property or financial affairs of a debtor.

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

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11 U.S.C. §101(4)

Claim means (A) right to payment, whether or not such claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.

(2)

Supreme Court, U.S.
FILED
MAY 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1910

In the Supreme Court of the United States

OCTOBER TERM, 1988

DANIEL H. OVERMYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
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Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1910

DANIEL H. OVERMYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order granting a motion for a judgment of acquittal following a jury verdict of guilty.

On January 28, 1986, petitioner and Edmund M. Connery were indicted in the United States District Court for the Northern District of Ohio. The indictment charged petitioner with six counts of bankruptcy fraud, in violation of 18 U.S.C. 152; two counts of conspiracy to commit bankruptcy fraud, in violation of 18 U.S.C. 371; and one count of mail fraud, in violation of 18 U.S.C. 1341. Connery, charged in six counts, was granted a severance. Pet. App. 21a.

Before the case was submitted to the jury, the district court granted a judgment of acquittal on five counts. The

court submitted the four remaining counts to the jury. Thereafter, the jury acquitted petitioner on three counts. The jury, however, returned a guilty verdict on a count charging that petitioner knowingly filed a false bankruptcy claim on behalf of Hadar International Leasing Company against the bankruptcy estate of D.H. Overmyer Telecasting. Pet. App. 21a. The false claim was based upon various television broadcast equipment leases between Hadar and Telecasting. Pet. App. 22a.

The district court granted a post-verdict judgment of acquittal on the ground that the government had, at best, established that petitioner filed a claim that was subject to dispute. The court found that a claim for lease payments prior to the installation of a transmitter was not properly treated as a false claim, that installation charges for work in progress were not fraudulent solely because they represented bids from contractors rather than full legal obligations, and that the government had not met its burden of showing that Telecasting had overpaid Hadar for its leasing obligations. Pet. App. 1a-19a.

The court of appeals reversed. Pet. App. 20a-59a. The court concluded that the jury had sufficient evidence before it from which it could reasonably conclude that petitioner's bankruptcy claim was intended to deceive the bankruptcy court.

Petitioner contends (Pet. 7-10) that the court of appeals ignored the expansive definition of "claim" in the Bankruptcy Code, 11 U.S.C. 101(4). Petitioner also contends (Pet. 11-15) that the false claim clause of 18 U.S.C. 152 does not apply to claims filed at a point in the proceedings where the parties contemplate full adversarial litigation on the claims.

Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his post-trial motion for a judgment of acquittal. If,

after the imposition of sentence by the district court, the court of appeals reverses petitioner's conviction because of trial error, his claims might be mooted by an acquittal following a second trial on the merits. If, on the other hand, the court of appeals affirms his conviction, petitioner will then be able to raise his present contentions before this Court, together with any other claims he may have with respect to possible trial errors or other errors in the proceedings, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

JUNE 1989

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* Because this case is in an interlocutory posture, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

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No. 88-1910

In the

Supreme Court of the United States

OCTOBER TERM, 1988

DANIEL H. OVERMYER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO MEMORANDUM IN OPPOSITION

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June 20, 1989

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In opposing petitioner's application for a writ of certiorari, the Government does not address the merits of the petition, nor does it dispute this Court's jurisdiction to adjudicate them, nor does it dispute fitness for review on the grounds of lack of preservation.

Rather, the Government advances the argument—ungraced by either statute, court rule or case law—that review by this Court of the court of appeals decision would be "premature at this time" [Gov't Mem. at p. 3]. In support of this *ipse dixit*, the Government hypothesizes a series of possible turns future litigation, not yet even in existence, might take, all of which is distinctly in the realm of the improbable.

True, the procedural posture of this case [review of a court of appeals judgment reversing a judgment of acquittal] is somewhat unusual, and that most federal criminal cases where certiorari is sought come to this Court only after all proceedings below have been completed. Nonetheless, the Government's memory is self-servingly short; currently pending on this Court's docket of undecided cases is *United States v. Monsanto,* No. 88-454 (argued March 21, 1989), a case where the Government itself sought certiorari from a court of appeals decision reversing an interlocutory order of a district court. The same kinds of unlikely turns of litigational events were hypothetically possible in that case as well, so it seems that "prematurity" is not so much a principle of review-worthiness as it is an expedient for the Government to trot out when convenient to its immediate purposes.

This petition presents a question of grave and direct implication to all bankruptcy litigants who, if the ruling below stands, might well be deterred from filing and pressing reasonably colorable claims for fear that, despite Congress' expansive and beckoning definition of "claim," they might end up convicted of filing a "false" claim. This is all the worse because the criminal statute itself was not intended to be applied to claims filed at a point in the proceedings where, as here, the parties contemplated full adversarial litigation. The upshot is that a losing *bankruptcy* court claimant runs a risk of criminal prosecution that a losing *district court* plaintiff litigating the same cause of action has no exposure to. Nothing either in the Bankruptcy Code or in Title 18, or in the legislative history of 18 U.S.C. §152 requires or anticipates such skewed treatment for the bankruptcy claimant.

Such are the direct and immediate implications of the ruling below, and they seem considerably more palpable than the Government's convenient and speculation-based theories of "prematurity."

CONCLUSION

For the foregoing reasons, and for those already stated in the petition, this Court is respectfully requested to grant this petition for certiorari.

Respectfully submitted,

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June 20, 1989